SUPREME COURT U. S.

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IN THE

Supreme Court of the United States

No. [redacted]222

October Term, 1969

JACK G. BUNCHER, d/b/a
THE BUNCHER COMPANY,

Petitioner,

v.

THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Jack G. Buncher, an individual doing business as The Buncher Company, Petitioner, respectfully petitions for a writ of certiorari to review Judgment on Rehearing of the United States Court of Appeals for the Third Circuit entered on March 13, 1969, by which the Court directed enforcement of an order of the National Labor Relations Board.

Opinions Below

The Judgment on Rehearing of the Court of Appeals, filed March 13, 1969, enforcing the Board's order, is printed in Appendix A, *infra*, pp. 1b-2b.

The Opinion on Rehearing, enforcing the Board's order, filed January 20, 1969, is reported at 405 F. 2d 787 and is printed in Appendix B, *infra*, pp. 3b-19b.

The Judgment of the Court of Appeals filed August 1, 1968, denying enforcement of the Board's order is printed in Appendix C, *infra*, pp. 20b-21b.

The Opinion of the Court of Appeals, denying enforcement of the Board's order, filed June 27, 1968, not officially reported, is printed in Appendix D, *infra*, pp. 22b-35b.

The Supplemental Decision and Order of the National Labor Relations Board, filed May 4, 1967, is reported at 164 NLRB No. 31 and is printed in Appendix E, *infra*, pp. 36b-45b.

The Trial Examiner's Second Supplemental Decision, filed May 23, 1966, is printed in Appendix F, *infra*, pp. 46b-72b.

Order of the National Labor Relations Board Remanding Proceeding to Trial Examiner, dated January 13, 1966, is printed in Appendix G, *infra*, pp. 73b-74b.

Trial Examiner's Supplemental Decision, filed August 6, 1965, is printed in Appendix H, *infra*, pp. 75b-96b.

Decision and Order of the National Labor Relations Board and Trial Examiner's Intermediate Report, in the original unfair labor practice proceeding, dated June 30, 1961, and reported at 131 NLRB 1444, is printed in Appendix I, *infra*, pp. 97b-147b.

Jurisdiction

The decree of the Court of Appeals was entered on March 13, 1969 (App. A, *infra*, p. 1b). Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented for Review

1. Where the National Labor Relations Board finds that an employer has no system of seniority and directs that in computing back pay under its order the non-discriminatory practices of the employer theretofore used in his business be used to determine which employees would be laid off or retained, is it arbitrary and unreasonable for the Board to devise and use in the back pay proceeding a system of pseudo seniority without any support whatsoever in the record and to reject all testimony in the record concerning the employer's non-discriminatory practices?

2. In a back pay proceeding before the National Labor Relations Board does the General Counsel for the Board have the burden of proving on a rational basis the amount of back pay due each claimant before the respondent is required to disprove General Counsel's contentions?

Statutory Provisions Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151 *et seq.*) are set forth in Appendix J, *infra*, pp. 148b-150b.

Statement of the Case

In 1961 the National Labor Relations Board found that Jack Buncher had committed an unfair labor practice in January and February, 1960, by laying off thirteen employees because of their union activity. *The Buncher Company*, 131 NLRB 1444. In its decision, the Board adopted the findings of its Trial Examiner, which recognized the unique nature of Buncher's business and the economic justification for a reduction in force shortly

following those months, and stated that inasmuch as some of the employees discriminated against might have been laid off in a subsequent reduction in force absent unfair labor practices, this possibility should be considered in computing back pay (App., p. 98b).

The guidelines stated by the Board were to be "such system of seniority or other non-discriminatory practice heretofore applied by the Respondent in the conduct of his business." (*Id.*)

The Board's order was enforced by the Court of Appeals for the Third Circuit, 316 F. 2d 928 (1963).

Thereafter in 1964 the Board instituted back pay proceedings, presumably in accordance with its prior order.

However, although the original Trial Examiner had found that Buncher had and used no system of seniority, the Regional Director for the Board prepared back pay computations based solely and entirely upon what purported to be a system of seniority. In point of fact this "system" was purely arbitrary, and did not credit all employees with all service, but assumed that anyone absent for seven days lost all his prior service, but anyone absent for less did not. Furthermore, the Board applied this seven day "rule" only to part of the period (Joint App. 186a-188a—Court of Appeals). It was contrived to punish, not as a genuine attempt to carry out the Board's ground rules as set forth in its prior decision, and upon which Buncher was entitled to rely. Neither Buncher nor anyone else to our knowledge ever used such a "system." The system also ignored the skills, or lack of skills, of the employees, and assumed that all those listed could do every job Buncher had with only two exceptions—a carpenter and a plumber.

As both the original Trial Examiner and the second Trial Examiner found, Buncher's business was unique (App. pp. 49b-51b, 106b).

He conducted a widely diversified business, including scrap reclamation, scrap breaking, construction and leasing of industrial buildings, demolition and salvage of buildings and bridge, steel fabrication, and operation and maintenance of a large river port, including a half-mile long dock and vessels. In order to carry on this business, he needed men who could perform the widely diversified jobs at the various locations (App. pp. 49b-51b). He had to have men who could fill the jobs that had to be filled at the time the work had to be done. Buncher couldn't have used straight seniority in selecting men to retain or recall if he had wanted to, nor could any sensible or valid appraisal of the situation in 1960 and 1961 be made using straight seniority.

Prior to the back pay hearing, the Trial Examiner ordered Buncher on pain of striking of his answer to the specifications to produce in writing in detail all the criteria used by him in selecting employees for retention and layoff, applying such criteria not only to the thirteen discriminatees, but to every employee retained at that time or subsequently employed (Joint App. 117a-118a—Court of Appeals).

Buncher did so in a document entitled "Respondent's Answer To Order To Show Cause."[1] (Joint App. 119a-133a—Court of Appeals).

[1] This response to an order to show cause contains the chart which both the Board and the Court criticize as "prepared after the fact" or "contrived," and which characterization is said to justify rejection of all 700 pages of testimony by witnesses. It was simply a pleading that had to be filed. It could hardly have been prepared before the specification to which it was an answer, and the fact that an answer denies liability and, as required by the rules, tells why liability is denied is no justification for rejecting all sworn testimony, even though some small part of the testimony differs from the pleading.

In the hearing which followed, General Counsel introduced no testimony or evidence whatsoever other than an explanation of the origin of the Regional Director's so-called "seniority" system.

Respondent, on the other hand, produced four witnesses who testified at length and specifically as to every operation of Buncher, every machine, every job, and every person employed, and as to every non-discriminatory factor listed. This testimony covered 700 pages of transcript in addition to documentary exhibits. None of this testimony was contradicted.

On August 6, 1965, the Trial Examiner handed down his Supplemental Decision, awarding the discriminatees approximately $19,000 in back pay, to May 12, 1960, which he held to be the first date of economic reduction in force, but rejecting the back pay specifications thereafter because he found that the Regional Director based his computations solely and entirely upon a fictitious system of seniority, contrary to the Board's previous decision, and that this was arbitrary and unreasonable.

On January 13, 1966, the Board issued an Order Remanding Proceeding to Trial Examiner stating that the fact that respondent did not use seniority did not render General Counsel's use of seniority arbitrary or unreasonable *per se* (App pp. 73b-74b).

On May 23, 1966, the Trial Examiner issued his Second Supplemental Decision (App. pp. 46b-72b) in which he rejected all respondent's testimony and awarded all amounts claimed in the specifications, some $99,000, plus interest.

On May 4, 1967, the Board issued its Supplemental Decision and Order upholding the Trial Examiner's second effort, saying that use of "seniority" was appropriate here

to prevent Buncher from profiting from his wrongdoing, and approving the Trial Examiner's rejection of all respondent's testimony. The Trial Examiner and the Board agreed that when Buncher and his witnesses said something complimentary about the discriminatees, they were truthful, but when they said anything that would justify their lay off, they were liars.

Respondent appealed. The case was heard by a panel of three judges of the Court of Appeals. Two judges held that the Board's use of its so-called seniority on the record in this case was unreasonable and arbitrary, pointing to the facts contained in the record (App. pp. 22b-35b). The third judge dissented, saying the Board's use of so-called "seniority" was not arbitrary or unreasonable in these circumstances (App. pp. 33b-35b).

The Court's judgment was entered on August 1, 1968 (App. pp. 20b-21b).

Thereafter, the Board petitioned for rehearing, and it was granted.

After argument before the Court *en banc*, the Court, by a majority of five to three, recalled its prior judgment denying enforcement of the Board's order and issued a new judgment enforcing it(App. pp. 1b-2b).

The Court majority held that the Board was correct in rejecting all the testimony and in creating and using what the Board called a system of seniority (App. pp. 7b-8b). The Court majority notes that admittedly Buncher had no seniority system (App. p. 8b) and that the "examiner's"[2] seven day rule was "admitedly rough" (App. p. 9b), but concluded that this was all right because if all respondent's

[2] This was not the Examiner's rule, but the Regional Director's.

testimony—indeed, the entire record—were rejected as incredible, respondent had failed to sustain its burden of proof, and the Board could use its "system" because there was no other.

The dissenting opinion, written by Circuit Judge Van Dusen and joined in by two other judges of the Court *en banc* (App. pp. 10b-21b) carefully analyzes the case on the basis of the whole record, and concludes that the Board's "seniority system" is unreasonable and arbitrary in the circumstances of this case; that the Board's order should be denied enforcement, and that the case should be remanded to the Board.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals decided a federal question in a way in conflict with the applicable decisions of the Supreme Court.

The decision in *Universal Camera Corp. v. Labor Board*, 340 U. S. 474, 491 (1951) established the standard to be applied by the Courts of Appeal in reviewing a decision of the National Labor Relations Board. The Court is to determine whether or not the Board's findings are based upon substantial evidence in the record considered as a whole.

The majority of the Court of Appeals in the instant case completely disregarded this standard, and upheld and enforced an order of the Board which has no support whatsoever in the record. Indeed, the Board's order is in contradiction to other and previous findings of two different Trial Examiners, the first of which were upheld by the Board and the Court in prior proceedings in this very case.

In addition, the Court of Appeals approved the Board's refusal to give any weight whatsoever to some 700 pages of uncontradicted testimony which is contrary to the Board's unsupported assumptions.

The Board's reason, implicitly approved by the Court of Appeals, was that if it did not make these unsupported assumptions, or if it gave any weight to the testimony and evidence in the record, Jack Buncher, who the Board had held committed an unfair labor practice, might escape the punishment which the Board felt he deserved.

There is no doubt that the Board has broad authority to fashion remedial orders, but this "does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the purposes of the Act might be effectuated by such an order." *Republic Steel Corp. v. Labor Board*, 311 U. S. 7 (1940); *Consolidated Edison Co. v. Labor Board*, 305 U. S. 197, 235, 236 (1938); *Labor Board v. Seven-Up Co.*, 344 U. S. 344, 349 (1953).

Furthermore, the Board's concern that Buncher would otherwise escape any liability unless it adopted a back pay formula without any foundation in fact or law is completely unwarranted.

If the case of each discriminatee were examined on the basis of the evidence, it is entirely possible that some discriminatees might receive back pay for part of the period, or some for all of the period, or some for none of the period.[3]

[3] Surely it is to Buncher's credit that as soon as he received the Board's original order late in 1961, he offered the discriminatees work, and most of them accepted, thus, terminating the back pay claim as of January 12, 1962, for all but three of the thirteen.

However, no fair and reasonable tribunal could find that although Buncher had only one power shovel operating, he would have kept five shovel operators on his payroll. Maybe one of the discriminatees would have worked, but not three (App. pp. 15b-18b), and thus one would receive back pay for the time the shovel worked and two would not.

In addition, the Board's method of determining who would have worked consisted of simply listing all employees according to an arbitrary "seniority" date (bearing no relationship to any seniority system ever used by Buncher, or by anyone else to our knowledge); by then drawing a line under the number of persons employed at any given time; and then conclusively presuming that anyone under the line would have been laid off (App. pp. 70b-71b).

This assumed that if Buncher had—as he did—a gantry crane to operate he would have laid off the gantry crane operator and used a welder to run the crane; or, if he needed a bargeman, he would have used a bulldozer operator; or if he needed a steeplejack, he would have used a laborer who never worked in high construction. There is not a word of testimony in the record to support an assumption so contrary to reason. The record is replete with testimony to the contrary.

The Board's rejection and disregard of all the evidence in this case is so arbitrary, capricious and contrary to reason and to its own instructions in prior proceedings in this very case that it exemplifies the need for reaffirmation of the principles announced in *Universal Camera, Republic Steel*, and the many decisions which have followed and applied these principles.

2. The Court of Appeals has decided an important question of federal law which has not been, but which should be settled by the Supreme Court.

The Board has in recent years been probing its authority to broaden and expand remedial orders.

In most cases this relates to its original orders. In the instant case, it relates to back pay, which is nonetheless a most important feature of the remedial order.

Does the Board, in a back pay case, have the burden of proving on a rational basis the gross amount of back pay due each claimant?

The Court of Appeals majority avoided a direct answer to this question, but it was a major point throughout the proceedings.

The Board had directed in its remedial order, and the Court approved, that in the back pay proceedings a determination of which, if any, discriminatees would have been laid off in the admittedly economic cutbacks in employment should be made in accordance with the system of seniority or other non-discriminatory practice heretofore applied by the respondent in the conduct of his business. *The Buncher Company*, 131 NLRB 1444 at 1445 (App. pp. 98b-99b).

Even the Board and the Court of Appeals concede that Buncher did not use the system of "seniority" adopted by the Board in the back pay proceedings (App. p. 8b). The Board made no effort to investigate any other non-discriminatory practices or factors for making the determination, either before or during the hearing.

The Trial Examiner, in his first Supplemental Decision (App. p. 75b) held that since General Counsel had the burden of proving on a rational basis the gross amount of

back pay due each claimant, and, since the so-called "seniority" method adopted was clearly irrational and contrary to the Board's original findings, respondent was not obliged to come forward to meet a "phantom" (App. p. 87b).

The decision of the Board approved by the Court of Appeals, attempts to place upon the respondent the burden of meeting this phantom—of disproving something never proved.

This question of federal law is critical in this case, and will apply to every back pay case. The Supreme Court should settle this question, and fix the obligation of the Board, acting through its General Counsel, to prove upon a rational basis the amount due each claimant in a back pay case before the respondent is obliged to come forward and rebut such proof.

The diversity of opinions in this case recommends the matter to the Court for review.

Thus, the second Trial Examiner disagreed with the Board; the Board in its second order disagrees with its first order; two judges of a three judge panel disagreed with the third; and five judges of the Court *en banc* disagreed with three judges of the Court.

In the interest not only of Buncher but of future litigants in back pay cases, the Supreme Court should settle this unresolved aspect of Labor Board remedies and procedures.

Conclusion

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

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v.

THE NATIONAL LABOR RELATIONS BOARD,

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APPENDICES A-J TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX A

Judgment on Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16,638

JACK G. BUNCHER, d/b/a
THE BUNCHER COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Intervenor.

Before: Hastie, Chief Judge, Biggs, Kalodner, Freedman, Seitz, Van Dusen, Aldisert and Stahl, Circuit Judges.

THIS CAUSE was first before this Court upon a petition to review, and a cross-petition for enforcement of, an order of the National Labor Relations Board, dated May 4, 1967, directed against Jack G. Buncher, d/b/a The Buncher Company, his agents, successors and assigns. The Court having heard argument of respective counsel on March 8, 1968, and having considered the briefs and transcript of record filed in this case, handed down its opinion on June 27, 1968, denying enforcement of the Board's order and remanding the case to the Board. Thereafter,

on August 1, 1968, this Court granted the Board's petition for a rehearing, and on January 20, 1969, handed down its opinion on rehearing denying the Company's petition to review and granting enforcement of the Board's order; and recalling the Judgment of this Court filed on August 1, 1968. In conformity therewith,

IT IS HEREBY ORDERED AND ADJUDGED by the Court that the order of the National Labor Relations Board, dated May 4, 1967, be and it hereby is enforced and that Jack G. Buncher, d/b/a The Buncher Company, his agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

By the Court,

COLLINS J. SEITZ,
Circuit Judge.

Dated: March 13, 1969.

APPENDIX B

Opinion on Rehearing

(Filed January 20, 1969)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16638

JACK G. BUNCHER, d/b/a
THE BUNCHER COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

Argued March 8, 1968
Reargued November 25, 1968

Before: Hastie, Chief Judge, Biggs, Kalodner, Freedman, Seitz, Van Dusen, Aldisert and Stahl, Circuit Judges.

SEITZ, Circuit Judge.

This is the decision on the Company's petition to review and set aside a supplemental backpay order of the National Labor Relations Board and the Board's request for its enforcement.

The present dispute arises out of a finding, approved by this court, that the Company had dismissed certain of its employees in violation of the Act. N. L. R. B. v. Jack G. Buncher, d/b/a The Buncher Company, 316 F. 2d 928 (3rd Cir. 1963). The Regional Director thereafter issued a backpay specification and Notice of Hearing formulated in accordance with § 102.52 of the Board's Rules and Regulations. It contained a statement of the dollar amounts allegedly due each discriminatee as well as the following statement of the method employed by him in determining whether the discriminatees would have been discharged in any event for purely economic reasons after May 12, 1960:

> "2. The first reduction in force at the Respondent Company's Nine Mile Run facility subsequent to March 4, 1960, occurred on May 12, 1960.
>
> "3. Each of the discriminatees was entitled to backpay in accordance with the weekly average hours worked by the employees of Respondent at the Nine Mile Run facility until May 12, 1960.
>
> "4. When there was not sufficient work available at the Nine Mile Run facility after May 12, 1960 for all of the discriminatees and all of the other employees who were employed at the Nine Mile Run facility at the time of the discrimination, an appropriate method of determining each discriminatee's entitlement to backpay during the period after May 12, 1960 is:
>
> "(a) By allocating the available jobs at the Nine Mile Run facility among the discriminatees and the aforesaid other employees in accordance with their seniority; and

"(b) Only when sufficient work was not available at the Nine Mile Run facility for a discriminatee, then by allocating the available jobs at all of Respondent's locations, namely, Nine Mile Run, Leetsdale and Yard, among the discriminatees and the other employees who were employed at all of said Respondent's locations at the time of the discrimination in accordance with their seniority.

"5. The seniority referred to in paragraph 4 above is based on an employee's most recent hiring date with Respondent.[1]"

"[1] An interruption of an employee's employment for a period of seven consecutive days or less is not deemed to constitute a break in seniority."

* * *

The Company filed a response to the specifications in which it challenged the position that seniority was a permissible basis for calculating the backpay. It listed some ten criteria which it indicated were utilized by it to determine whether to retain or re-employ employees. It attached a chart purporting to apply the criteria to the discriminatees, retained employees, and employees first hired during the backpay period. It was admitted, however, that the chart was prepared after the fact on the basis of personal recollections by the Company's supervisors concerning 225 employees over a four and one half year period.

Thereafter the matter came on for hearing. The Company sought to establish the validity of the chart attached to its response by the testimony of its supervisors. The trial examiner found that no employee was entitled to backpay for the period after May 12, 1960. He so concluded because the backpay claims were based on "senior-

ity", whereas the Company did not use seniority in effectuating reductions in force. The Board reversed and remanded, holding that "an absence of the use of seniority by the Respondent does not render the General Counsel's utilization of seniority in this proceeding unreasonable, *per se.*"

Upon remand the trial examiner first considered the Company's evidence in support of its claim that none of the discriminatees would have been rehired after May 12, 1960, because the employees retained or newly hired during that period met the Company's employment criteria, and the discriminatees did not. The examiner, after noting that the evaluations were not based on any written records, concluded from his analysis that the Company's testimony was "fraught with inconsistencies, internal contradictions, exaggerations and implausibilities". He noted that the Company's sole proprietor, Jack Buncher, had testified that there was nothing seriously wrong with the discriminatees' work, and that he would rehire them if needed. He also found that the Company trained employees to perform tasks which the discriminatees could have been trained to perform. In the light of these and other findings, the trial examiner decided that "the charted information was contrived for the purpose of denying backpay to the discriminatees". He therefore rejected the Company's evidence and recommended that the Board adopt the specifications of General Counsel.

The Board affirmed the examiner's decision. It pointed out that since the Company's "system" had been discredited it was impossible to determine precisely the amount of backpay in any particular case. It held further that to

prevent the General Counsel from estimating the pay each discriminatee would have earned because he was unable to establish with certainty that the employees would have been retained would permit the Company to profit from its own wrong. In consequence the Board found that the premises underlying the General Counsel's prima facie case were reasonable and directed the petitioner to comply with the examiner's recommended order. The proceedings before this court followed.

Where it has been established, as here, that an employer has discharged employees discriminatorily, but it asserts in mitigation of backpay claims that such employees would have been laid off even absent such discrimination, it has the burden of proving that fact. N. L. R. B. v. Mastro Plastics Corp., 354 F.2d 170, 175-176 (2nd Cir. 1965), cert. den. 384 U. S. 972 (1965). The examiner offered and the Company took full advantage of the opportunity to meet its burden of producing credible evidence from which a remedial formula might be adopted by the Examiner to approximate the result in the absence of discrimination.

A chart, prepared after the fact, was introduced into evidence by the Company. It listed numerous non-discriminatory factors and evaluations concerning its employees during the pertinent period, which tended to support the Company's contention that none of the discharged employees would have been rehired. It also offered elaborate supporting testimony. The examiner found, and his findings have substantial record support when the record is considered as a whole, that the Company's evidence contained so many pervasive infirmities that it was not a reliable basis for deciding the backpay issue. The matter

being in this posture, was it arbitrary or unreasonable for the examiner to apply the seniority rule suggested by General Counsel? Admittedly, this Company did not have a formal seniority system. But the record in this case does indicate that length of service was a factor in its employment "policy." Furthermore, the seniority standard represents "normal industrial practice generally." NLRB v. Kartarik, Inc., 227 F.2d 190 (8th Cir. 1955). Thus, in our view, considering the credible evidence in this record, the seniority standard was a rationally permissible device for the examiner to employ in fashioning the remedy.

But the Company argues that there is no substantial evidence to support the use of the seniority formula and, further, that its use was in contradiction to other and previous findings of the Board which are said to have substantial evidentiary support. In our view, these contentions fail to give appropriate recognition to the manner in which these proceedings unfolded. Certainly the previous findings of the Board showed that the Company did not have a formal seniority system. But it does not follow that the use of such a factor in molding relief is automatically unreasonable where the Company, though having the burden and given the opportunity, failed to supply credible evidence in support of some other method of approximating the situation absent discrimination. Having in mind that the examiner was seeking an approximation, the remedy is not objectionable merely because it may not be consistent with the work histories, etc. of some of the employees involved. The Company had a full and fair opportunity to make its record in this already protracted proceeding. Since the burden here was on the Company, and since it failed to carry that burden, we think the examiner and the

Board properly adopted the seniority device as a rational remedy on this record.

The Company attacks the examiner's admittedly rough rule that seven consecutive days or less of interruption in employment was not deemed to constitute a break in seniority. The record showed that employees were often discharged for "cause" and rehired without any economic sanctions. The evidentiary history of this rather "personalized" operation justified some rule to cover this problem. We cannot say on this record that the period adopted was unreasonable.

Finally, we consider the Company's contention that the Board erred in concluding that the Company was liable for backpay as to all discriminatees up to May 12, 1960, which was the date of the first economic reduction in force subsequent to the last discriminatory lay-off.

The Company urges that the first lay-off for economic reasons subsequent to the discriminatory one would have occurred during the week of March 10, 1960, because it was clear by that date that the Company was operating the Nine Mile Run facility efficiently with the reduced work force. From this premise, the Company reasons that, had it then carried thirty-five men rather than the twenty-two actually employed, (there being thirteen discriminatees), it would have reduced its work force to twenty-two. This contention contains so many doubtful propositions that we cannot say the Board was unreasonable in rejecting it. First, of course, it suggests the Company would have been aware of the economic feasibility of operating the facility with twenty-two men on March 10, 1960. Considering the nature of the Company's operation we do not think that there would have

necessarily been such a precise correlation between economic efficiency and the number of employees retained. Another infirmity in the Company's contention is its assumption that had there been a reduction in the work force for purely economic reasons the discriminatees would have been among those discharged. In any event, there is no basis for assuming that the discriminatees would not have been transferred to other operations of the Company. When these factors are considered in conjunction with the admittedly objective evidence of an economic reduction in force on May 12, 1960, we think the Board was justified in using that date as the commencement date for inquiry into possible economic justification for the discharge of the discriminatees. We say this without passing upon the correctness of the Board's reasoning that the Company's contention here constitutes an attempted relitigation of the unfair labor practice proceeding.

We think that, in these circumstances, the Board did not exceed its power in concluding that the Company did not make a showing entitling it to the relief requested with respect to the period prior to May 12, 1960.

We therefore deny the Company's petition to review and to set aside the Board's order and grant the Board's cross-petition to enforce its order.

VAN DUSEN, Circuit Judge, dissenting.

I respectfully dissent from the majority opinion because this record shows the determination of back pay, based on the seniority system adopted by the General Counsel, is arbitrary and unreasonable under the circumstances and

that the substantial award is punitive, rather than remedial, in nature.[1]

The trial examiners in both the original unfair labor practice case and the present back pay case made detailed findings of the peculiar nature of Buncher's business and his employment practices. Buncher operated out of three locations: Nine Mile Run, Leetsdale, and the "Yard." The business was quite diversified, including scrap reclamation, scrap breaking, construction and leasing of industrial buildings, demolition and salvage of buildings and bridges, steel fabrication, and operation and maintenance of a large river port, including a half-mile long dock with gantry cranes and vessels (722a, 191a-194a, 205a-208a). Buncher's diversification apparently resulted from efforts to avoid sole dependence on the steel industry's fluctuating needs for scrap retrieved from slag. He needed men who could perform various jobs at the several locations, jobs ranging from the

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[1] In the unfair labor practices action, the Board decided that Buncher had discriminated against 13 employees, 131 N. L. R. B. 1444, 1447. (Appendix A). The Board's order was enforced by this court. *N. L. R. B. v. Buncher*, 316 F.2d 928 (3rd Cir. 1963). Thereafter, in a Supplemental Decision, the second trial examiner recommended an award of $19,519.47, plus interest, to the 13 discriminatees. His decision was reversed and remanded, whereupon he awarded a total of $99,236.32, plus interest, on the basis of the seniority formula quoted in the majority opinion. That award conformed exactly to the Backpay Specification as to 10 discriminatees; in the case of two others, the Specification was reduced by a total of $52.86; the remaining discriminatee's award was $24.24 less than the amount provided in the Specification. The Second Supplemental Decision, as affirmed by the Board, has not yet brought an end to these back pay proceedings because discriminatees Ivy, Rutherford, Loughner and Wytiaz may be entitled to additional back pay.

It is noted that the assumption that work similar to that which the four discriminatees possibly eligible for additional back pay had been doing was available at Nine Mile when Buncher rehired them at Leetsdale, appears unsupported by the record. Wytiaz, for example, immediately prior to the discrimination had just been given "the opportunity to start breaking in on some pieces of equipment" at Nine Mile Run (347a) following his initial job as a laborer, which laboring job he was given at Leetsdale. Other discriminatee equipment operators (Robert Vinsick and Ronald Loughner) would all have been senior to Wytiaz, making it appear unlikely that this equipment operator job was available for him at Nine Mile Run in September 1962.

construction of warehouses and docks to the demolition of buildings and the operation of several complicated machines. The lengthy 1960 Intermediate Report in the unfair labor practice proceeding discussed in great detail Buncher's defense that the discharges beginning January 15, 1960, were motivated by economic reasons considered by the employer as early as December 1959 (131 N. L. R. B. at 1456-59). This defense included the argument that discrimination could not be shown from the fact that some men retained had less seniority than those discharged because Buncher used no seniority system. The trial examiner accepted this proposition, but also found that, despite the strong economic defense (131 N. L. R. B. at 1456), discrimination was shown by the "timing of the terminations" (131 N. L. R. B. at 1457) and the fact that all discriminatees were union adherents (131 N. L. R. B. at 1460). In reaching this conclusion, he noted that:

> "It is appreciated that in an economic cutback, selection of men equally competent requires fine decisions, particularly in the absence of a seniority agreement or practice, and the Company's business judgment is not to be lightly cast aside and errors in judgment substituted for proof of discrimination. The Company's asserted reasons for its selections, however, cannot be considered apart from the considerable evidence indicating discrimination in selection set forth above." 131 N. L. R. B. at 1460

The Board, in its decision of June 30, 1961 (131 N. L. R. B. at 1444), approved this finding of lack of a seniority system and of the peculiar nature of Buncher's business,[2] to which this court explicitly referred in enforc-

[2] "The Board . . . hereby adopts the Trial Examiner's findings, conclusions, and recommendations, . . ." 131 N. L. R. B. 1444.

ing the order, 316 F. 2d at 929. In light of these prior findings and after an examination of the testimony offered by petitioner[3] to support the back pay computation,[4] the use of seniority (in the Board's back pay fomula quoted in the majority opinion) appears arbitrary and unreasonable. The unfair labor practice proceeding, with its finding of a violation of § 8(a)(3), proves only that some back pay is owed; if the precise amount cannot be determined, the Board's approximation must still have a rational basis. This basis for the back pay does not become more rational

[3] To rebut the petitioner's backpay formula, respondent's extensive chart and supporting testimony showed that the rating of each employee in these categories governed all layoff, hiring or transfer:

"(1) Ability to do the available work, including:
  (a) Relative ability to perform the employee's regular job; and
  (b) Relative ability to perform other jobs in the same plant; and
  (c) Relative ability to perform the same job or other jobs in other plants of the Company.
(2) Rate of Pay.
(3) Productivity.
(4) Application to work.
(5) Attitude toward work and willingness to learn.
(6) Ability to learn new skills.
(7) Limitation on availability.
(8) Experience with the Company.
(9) Experience with other employers.
(10) Relative length of service with the Company. Although the Company has no formal system of seniority, and has not laid off or recalled by strict seniority, relative length of service has been and is one factor considered along with the others.

[4] This testimony covered approximately 50 transcript pages (as contrasted with management testimony covering approximately 700) and showed that the seniority-based back pay calculation rested on unsubstantiated assumptions such as seven days of layoff breaking seniority and the date of last hire, as opposed to original hire, being the crucial date. The compliance officer who testified (186a, 188a) stated that he paid no regard to the type of work available and that the seven-day layoff "rule" was not used consistently but only to establish seniority as of 1/14/60 and not for seniority changes thereafter. In a comprehensive recent article on this subject, this statement appears: "Throughout the history of back-pay proceedings under the Act, there has been no dispute that the Board bears the burden of proving the gross amount of back pay due each claimant." Fuchs & Kelleher, "The Back-Pay Remedy of The National Labor Relations Board," 9 Boston College Industrial and Commercial Law Review, 829, 860 (1968).

because the second trial examiner rejects, for the first time in his Second Supplemental Decision, some of the employer's evidence as subjective and self-serving, particularly where the first trial examiner did not find the testimony of substantially the same Company witnesses "fraught with inconsistencies, internal contradictions, exaggerations and implausibilities."[5]

Not only is there an absence of substantial evidence to support the seniority system used to calculate the back pay, but the sole reliance on such a seniority system (and its "ground rule" that a seven-day layoff would break seniority, but only for purposes of determining seniority up to January 14, 1960) is in contradiction to other and previous findings of two trial examiners concerning Buncher's business operation which were based upon substantial evidence in the record as a whole.[6]

No reason has been shown to justify rejection of the findings of the trial examiner in his Intermediate Report, 131 N. L. R. B. 1448, affirmed by the Board, 131 N. L. R. B. 1444, and by this court, *N. L. R. B. v. Buncher,* 316 F. 2d 928 (3rd Cir. 1963); *cf. N. L. R. B. v. United States Air*

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[5] Although the first trial examiner did not accept certain denials of these witnesses (see 131 N. L. R. B. 1453-54), he did not dismiss their entire testimony with eight such sweeping words first used by the second trial examiner after his less drastic approach to the back pay problem had been reversed by the Board.

[6] *Universal Camera Corp. v. Labor Bd.*, 340 U. S. 474, 491 (1951). It is noted, for instance, in the trial examiner's first supplemental decision, fn. 17, he observed that:

> "The General Counsel introduced into evidence General Counsel's Exhibit No. 3 in an attempt to demonstrate that, during a reduction in force in 1957, Respondent 'basically' utilized seniority in affecting the reduction at the Nine Mile Run location. This attempt proved abortive. The exhibit shows that 34 employees were employed on the date of the layoff, and 16 of them were separated. Nine of these employees, including a discriminatee, were laid off out of context with their seniority."

Con. Corp., 336 F. 2d 275 (6th Cir. 1964); *N. L. R. B. v. Biscayne Television Corporation*, 337 F. 2d 267 (5th Cir. 1964). On the basis of this first trial examiner's findings that various modifications and improvements were made to Buncher's plant during the 1959 steel strike (131 N. L. R. B. at 1457); that Buncher had decided there were too many employees on the payroll and determined to lay some off (131 N. L. R. B. at 1457); and that only 7 or 8 acres of the original 200-acre slag dump at Nine Mile Run remained to be worked, and less heavy equipment was, therefore, needed (131 N. L. R. B. at 1457), he concluded that Buncher had an economic justification for reducing the staff (131 N. L. R. B. at 1460-61). The only questions in the back pay proceeding then were which employees were to be laid off, at what time, and by what standards (see 131 N. L. R. B. at 1457).

At best, the record made at the back pay hearings is incomplete and the case deserves a remand in order to benefit from further testimony. An example of the incompleteness of the testimony to support even the specific findings in the Second Supplemental Decision is evidenced by the finding that "on and after May 12, 1960, Respondent had jobs available at Nine Mile for . . . two shovel operators . . . ." (731a-32a). The only testimony shows that there were two shovels being used on March 10, 1960 (455a), but that when the back pay testimony was given in 1965, Mr. Green, the General Manager of Buncher Company, made clear that only one shovel was then, and had been, in operation at that location (375a). Also, he testified that only one shovel was being operated there following May 12, 1960 (243a-244a). It is unclear from the testimony whether Buncher ever operated two shovels at the

same time at Nine Mile Run after May 12, 1960, but the record makes this seem most unlikely. That fact would be significant for two reasons. First, there were five discriminatees whose job it was to operate the shovel. It is, therefore, necessary to determine which two of the five, if any, would have been retained, absent the discrimination. When the operation was reduced to one shovel, the back pay for one of the operators should be terminated on that date. Second, three of the discriminatee shovel operators (Greene and the Cindricks) were found to be entitled to no back pay after January 12, 1962. Assuming two of these three were entitled to back pay originally, the back pay for one of these two should have been cut off prior to January 12, 1962, provided, as the record indicates, operation of one of the shovels did not resume between May 12 and that date. No reason has been shown why the trial examiner, who made back pay awards based on the operation of two shovels, could not determine when single shovel operations began, which two of the five discriminatees, if any, would have operated the shovels but for the discrimination, and, when only one shovel was operated, which discriminatee, if any, would have operated the shovel absent the discrimination.[7]

Also, the findings and comments in the Second Supplemental Decision (719a-745a) contain references, favorable to General Counsel's Backpay Specifications, concerning certain discriminatees but fail to refer to further explana-

[7] If it were determined that John Cindrick would not have been retained as a shovel operator when the operation was reduced to one shovel, his back pay must terminate on that date, since he was exclusively a shovel operator (611a and 2b ff. in #13982) and he refused to work anywhere but at Nine Mile (603a). Conceivably, only one shovel was used prior to January 12, 1962; if that is so, there should be a corresponding reduction in the back pay award to him.

tory or additional testimony of the same witness which points to the opposite conclusion.[7] In the case of John Cindrick, for example, the trial examiner relies on respondent's admission that Cindrick was an excellent shovel operator (612a), but fails to consider that the same witness testified that Cindrick refused to go to Leetsdale, "wouldn't get his hands dirty with grease," and would not do any other work (612a).[7] I have been unable to find any support in the record for statements in the Second Supplemental Decision such as that Gerald Hinger, a retained employee, had "an admitted lack of proficiency in the jobs in which the Cindricks and Greene concededly excelled . . ." (740).[8]

This language of the Supreme Court of the United States appears to apply to the situation presented by this record:

> ". . . [T]he Board may [not] apply a remedy it has worked out on the basis of its experience, without regard to circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act." *Labor Board v. Seven-Up Co.*, 344 U. S. 344, 349 (1953). See, also, *N. L. R. B. v. Ozark Hardwood Company*, 282 F. 2d 1, 7-8 (8th Cir. 1960).[9]

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[8] Herbert Green testified that Hinger was "a good man" operating the shovel (363a; see, also, 111b in #13982).

[9] In *Republic Steel Corp. v. Labor Board*, 311 U. S. 7, 11-12 (1940), this language was used:

> "This language should be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may

(Footnote continued on following page)

The arbitrary imposition of this seniority system under these peculiar facts fails to take job assignments and employee capabilities into account. There are five discriminatee shovel operators, for example, yet there were, at most, only two shovels at Nine Mile Run. The seniority system adopted in the Backpay Specification would cause arbitrary assignment of discriminatees to jobs for which they are unqualified, and would require that certain retained employees be dismissed to make room for discriminatees who are incapable of performing the tasks incident to such jobs and would not have been assigned such work but for the fictional solution of seniority.

The propriety of the determination that petitioner had admitted liability for back pay up to May 12, 1960, seems doubtful if based, as it appears, solely on the ground that Buncher sought to relitigate the unfair labor practice pro-

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(Footnote continued from preceding page)

choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.' We have said that the power to command affirmative action is remedial, not punitive. *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 235, 236. See, also, *National Labor Relations Board v. Pennsylvania Greyhound Lines*, 303 U. S. 261, 267, 268. We adhere to that construction."

Again, in the *Seven-Up case, supra*, the court said at page 346:

"Section 10(c) of the Taft-Hartley Act, under which the Board made its award, derives unchanged, so far as is now relevant, from the National Labor Relations (Wagner) Act. 49 Stat. 449, 454. It charges the Board with the task of devising remedies to effectuate the policies of the Act. Of course the remedies must be functions of the purposes to be accomplished, and in making back pay awards, the Board operates under a further limitation. It must have regard for considerations governing the mitigation of damages; it must, that is, heed the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment.'"

ceeding.[10] However, a new Backpay Specification might make this issue moot.[11]

For the foregoing reasons, I would grant the Petition to Review, set aside the Board's order, remand the case to the Board for proceedings in the light of this opinion, and deny the Board's cross-petition to enforce its order.

Kalodner and Aldisert, Circuit Judges, join in this dissent.

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[10] The present case does not, for example, seem to fit the situation in *N. L. R. B. v. United States Air Con. Corp.*, 336 F. 2d 275 (6th Cir. 1964), and *N. L. R. B. v. Biscayne Television Corporation*, 337 F. 2d 267 (5th Cir. 1964). The 13 illegal discharges in this case occurred between January 15 and March 4, 1960, and it is not relitigation to contend, for instance, that employees illegally discharged in January might have been legally discharged subsequent to that date but prior to March 4, or prior to May 12.

It is noted that the General Counsel's Exhibit #14 showed a sharp drop in employment at the Nine Mile Run plant from a 1/7/60 high of 34 to an 8/4/60 low of 15, with a rather consistent number of 22 from 2/25 to 5/12 before the total became 18 or under until December 1960 (with one exception). Similarly, Exhibit #11 showed a drop of the total at all three Buncher operations from a 1/7/60 high of 73 to a 5/10/61 low of 41, with a frequent total of 48 during the period after 5/5/60.

[11] At least some of the allegedly important factors in Buncher's evaluation, of which Buncher employees' jobs would have been terminated due to economic cutbacks and the dates of such terminations, are capable of objective proof by means other than testimony and cross examination of members of the employer's management. The number of jobs employees have performed, their willingness to transfer to other plants, rates of pay, limitations on their availability, experience with Buncher, and experience with other employers are examples of criteria suggested by Buncher, which may be obtained by interviewing employees, including the discriminatees, and by using documentary and other evidence. Such factors (and possibly others), if challenged, thus appear capable of "objective" proof. The Regional Director can secure such information, affidavits, etc., and can augment calculations based on relative length of service with Buncher in order to make the back pay calculation a more rational approximation in light of the demonstrated, peculiar characteristics of Buncher's business operation. Other Board back pay formulas such as the "comparable employee" formula, *East Texas Steel Castings Company, Inc.*, 116 N. L. R. B. 1336, 1337 (1956), enforced 255 F. 2d 284 (5th Cir. 1958), or the "representative employee earnings test," *N. L. R. B. v. Charley Toppino and Sons, Inc.*, 358 F. 2d 94, at 97 (5th Cir. 1966), may be adaptable to the facts in this case, particularly in some combination with a seniority system that conforms more to Buncher's practice. Moreover, such a Backpay Specification may be capable of more meaningful examination before the trial examiner so that he would not be faced with the dilemma, which he apparently thought confronted him in this case, of approving all or none of the Regional Director's back pay approximations as presented by the General Counsel.

APPENDIX C

Judgment, August 1, 1968, Denying Enforcement of Board's Order

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16,638.

JACK G. BUNCHER, d/b/a
THE BUNCHER COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Intervenors.

Before: Biggs, Seitz and Van Dusen, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of Jack G. Buncher, d/b/a The Buncher Company to review an order of the National Labor Relations Board issued against petitioner on May 4, 1967, and upon the cross-petition of the National Labor Relations Board to enforce such order. The Court heard argument of respective counsel on March 8, 1968, and has considered the briefs and transcript of record filed in this cause. On June 27, 1968, the Court, being fully advised in the premises, handed down its opinion denying the Board's cross-petition for enforcement of the said order.

Judgment, August 1, 1968, Denying Enforcement of Board's Order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Third Circuit that the order of the National Labor Relations Board, dated May 4, 1967, directed against Jack G. Buncher, d/b/a The Buncher Company, his agents, successors, and assigns be and it hereby is denied.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that the case be, and it hereby is remanded to the Board for further proceedings consistent with this Court's opinion.

BY THE COURT,

FRANCIS L. VAN DUSEN,
Circuit Judge.

Dated: August 1, 1968.

APPENDIX D

Opinion of Court of Appeals, June 27, 1968 Denying Enforcement of Board's Order

(Filed June 27, 1968)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16638

JACK G. BUNCHER, d/b/a
THE BUNCHER COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued March 8, 1968

Before: Biggs, Seitz and Van Dusen, Circuit Judges.

By VAN DUSEN, Circuit Judge.

An employer, Jack G. Buncher, asks this court to review and set aside a National Labor Relations Board (NLRB) order awarding back pay to 13 employees (dis-

criminatees) whose discharges the NLRB earlier found constituted unfair labor practices in violation of § 8(a)(3) of the NLRA, 29 U. S. C. § 158(a)(3). The Board's decision and order concerning the discriminatory discharges, 131 N. L. R. B. 1444 (1960), had stated that:

> "It appears that following the layoffs . . . the Respondent's business operations were more efficient and the work load could be accomplished with a reduced work force. It is therefore possible that some of the employees discriminated against on January 15 through March 4, 1960, might have been laid off in a subsequent reduction in force even absent the Respondent's unfair labor practices. Under these circumstances, we shall order the Respondent to offer those employees . . . immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority and other rights and privileges, dismissing, if necessary, all employees since then hired. If there is not then sufficient work available, the Respondent shall place those employees for whom no immediate employment is available on a preferential list, with priority in accordance with the system of seniority or other nondiscriminatory practice heretofore applied by the Respondent in the conduct of its business, and thereafter offer them reinstatement as such employment becomes available and before other persons are hired for such work.
>
> "We shall also order the Respondent to make whole those employees . . . for any losses they may

have suffered because of the Respondent's discrimination, by payment to each of them of a sum of money equal to that which he would have earned as wages from the date of such discrimination to the date of the offer of reinstatement or placement on a preferential list . . . . As some of the employees discriminated against on January 15 through March 4, 1960, might have been laid off in a subsequent reduction in force, even absent unfair labor practices, such possible termination of employment shall be taken into consideration in computing the back pay due these employees under the terms of this Order."

The Board's order was enforced by this court, *N. L. R. B. v. Buncher*, 316 F. 2d 928 (3rd Cir. 1963), where we noted:

> "The Board's order of June 30, 1961, as amended by its clarifying order of September 22, 1961, recognizes that respondent's business operations were more efficient and the work load could be accomplished with a reduced work force. Its order takes that situation into consideration and properly accommodates its reinstatement provisions in accordance with it."

In subsequent proceedings, pursuant to NLRB rules, the parties attempted to implement that part of the enforced order which related to reinstatement of the discriminatees and their back pay.[1] The trial examiner's

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[1] "ORDER . . .

"2. . . .

(a) Offer to the employees listed in Appendix A immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings suffered as a result of the discrimination against them, in the manner described in the section of this Decision and Order entitled 'The Remedy.'

(Footnote continued on following page)

first supplemental decision of August 5, 1965, construed Buncher's answer to the Backpay Specification as admitting liability for back pay from the date of the discharges, January 15 through March 4, 1960, up to the date of a substantial reduction in work force that occurred on May 12, 1960.[2] The trial examiner refused to approve or adopt the rest of the Backpay Specification computed by the Board's compliance officer on the basis of a seniority system of hire, layoff and transfer. He reasoned that if Buncher could not contest the award for the period prior to May 12, 1960, as it constituted an attempt to relitigate the unfair labor practice proceeding, the General Counsel should also be bound by the prior proceeding in which another trial examiner,[3] the Board and the court had found that Buncher did not use any system of seniority in rehiring, layoff or transfer of these employees. Accepting this prior finding of no seniority system, the trial examiner

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(Footnote continued from preceding page)

(b) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine employment rights and the amount of backpay due.

(c) Post at his facilities . . . copies of the notice attached hereto . . . .

"NOTICE TO ALL EMPLOYEES . . .

"WE WILL offer to those individuals found discriminated against immediate and full reinstatement to their former, or substantially equivalent positions, without prejudice to their seniority and other rights and privileges.

"WE WILL make whole those individuals found discriminated against for any loss they may have suffered as a result of the discrimination against them."

[2] This award to the 13 discriminatees was for a total of $19,519.47 plus interest.

[3] Trial Examiner Bott apparently died after hearing the discharge case, and Trial Examiner Rosenberg heard the back pay evidence and arguments.

ruled that the seniority-based computations lacked a rational basis. Accordingly, the General Counsel's case being a "phantom," it was unnecessary to decide whether Buncher had proved that the discriminatees would have subsequently been laid off for economic reasons, thus reducing any back pay owed for the quarters after May 12, 1960.

The NLRB reversed and remanded this first supplemental decision to the trial examiner for findings and conclusions on the post-May 12, 1960, pay awards, declaring that the General Counsel's use of seniority in the computations was not arbitrary or unreasonable *per se*. The second supplemental decision of May 23, 1966, with three small variations, granted the full back pay computed for the 13 discriminatees.[4] In doing so, the trial examiner analyzed Buncher's arguments for economically justified layoffs. This affirmative defense consisted of a detailed chart showing all Buncher employees since the first discriminatory discharge and their ratings in any of 52 jobs performed for Buncher, as well as their rating in the ten categories that Buncher said governed all layoff, hiring or transfer.[5] The trial examiner, after also considering ap-

[4] This second award totaled $99,236.32, plus interest, and as to 10 discriminatees equalled the exact sum listed in the Backpay Specification. On two others, the award was reduced by a total of $52.86; and on a third the award was increased by $24.24.

[5] Buncher listed these categories as:

"(1) Ability to do the available work, including:

(a) Relative ability to perform the employee's regular job; and

(b) Relative ability to perform other jobs in the same plant; and

(c) Relative ability to perform the same job or other jobs in other plants of the Company.

(Footnote continued on following page)

proximately 700 pages of testimony of Buncher employees explaining the chart, concluded that "inconsistencies, internal contradictions, exaggerations, and implausibilities" in the testimony and chart showed that the chart "was contrived for the purpose of denying back pay to the [discriminatees] . . . ." Consequently, such examiner found that, Buncher not having sustained his burden of proof, the General Counsel's prima facie case for the seniority-calculated back pay should prevail.

We agree with the trial examiner and the NLRB that under § 10(c) of the NLRA [29 U. S. C. § 160(c)] the Board is vested with wide discretion in devising procedures and methods for awarding back pay to discriminatees as long as the award is remedial, not punitive.[6] In particular cases where the award cannot be computed precisely, the Board can exercise its power by adopting formulas that are approximations.[7] But such approximations must not be "arbitrary or unreasonable in the circumstances in-

(Footnote continued from preceding page)

(2) Rate of Pay.
(3) Productivity.
(4) Application to work.
(5) Attitude toward work and willingness to learn.
(6) Ability to learn new skills.
(7) Limitation on availability.
(8) Experience with the Company.
(9) Experience with other employers.
(10) Relative length of service with the Company. Although the Company has no formal system of seniority, and has not laid off or recalled by strict seniority, relative length of service has been and is one factor considered along with the others."

[6] *Edison Co. v. Labor Board*, 305 U. S. 197, 235-36 (1938); *Nabors v. N. L. R. B.*, 323 F. 2d 686, 690 (5th Cir. 1963); *N. L. R. B. v. Ellis and Watts Products, Inc.*, 297 F. 2d 576, 577 (6th Cir. 1962); *N. L. R. B. v. Brown & Root, Inc.*, 311 F. 2d 447, 452 (8th Cir. 1963).

[7] *E.g., N. L. R. B. v. Brown & Root, Inc., supra*, at 452.

volved."[8] The Board's statement is correct that a finding of a discriminatory discharge in violation of § 8(a)(3) "necessarily establishes a pay loss by the employees for, without discrimination, the selection would not have been made until some point later in time." And we agree that in computing back pay, an employer should not be allowed to relitigate the very discharges found illegal,[9] and that the employer carries the burden of proving economic non-discriminatory reasons why subsequent layoff would have occurred.[10]

We disagree, however, with the conclusions reached by the Board in applying these legal rules to this particular case. The trial examiners in both the original unfair labor practice case and the present back pay case made detailed findings of the peculiar nature of Buncher's business and his employment practices. Operating out of three locations, Buncher had a diversified business which apparently resulted from efforts to avoid sole dependence on the steel industry's fluctuating needs for scrap retrieved from slag. Buncher needed men who could perform diverse jobs at the several locations, jobs ranging from the construction of warehouses to the operation of several complicated machines. The lengthy 1960 Intermediate Report in the un-

[8] *E.g., N. L. R. B. v. Ozark Hardwood Company*, 282 F. 2d 1, 7 (8th Cir. 1960).

[9] *E.g., N. L. R. B. v. United States Air Con. Corp.*, 336 F. 2d 275, 276 (6th Cir. 1964); *N. L. R. B. v. Biscayne Television Corporation*, 337 F. 2d 267, 268 (5th Cir. 1964).

[10] *E.g., N. L. R. B. v. Mastro Plastics Corporation*, 354 F. 2d 170, 175-76 and n. 5 (2nd Cir. 1965); *N. L. R. B. v. Biscayne Television Corporation, supra; N. L. R. B. v. Charley Toppino and Sons, Inc.*, 358 F. 2d 94, 96 (5th Cir. 1966).

fair labor practice proceeding discussed in great detail Buncher's defense that the discharges beginning January 15, 1960, were motivated by economic reasons considered as early as December 1959 (131 N. L. R. B. at 1456-59). This defense included the argument that discrimination could not be shown from the fact that some men retained had less seniority than those discharged because Buncher used no seniority system. The trial examiner accepted this proposition, finding, instead, that despite the strong economic defense (131 N. L. R. B. at 1456), the discrimination was shown by the "timing of the terminations" (131 N. L. R. B. at 1457) and the fact that all discriminatees were union adherents (131 N. L. R. B. at 1460). In reaching this conclusion, he noted that:

> "It is appreciated that in an economic cut back, selection of men equally competent requires fine decisions, particularly in the absence of a seniority agreement or practice, and the Company's business judgment is not to be lightly cast aside and errors in judgment substituted for proof of discrimination. The Company's asserted reasons for its selections, however, cannot be considered apart from the considerable evidence indicating discrimination in selection set forth above." 131 N. L. R. B. at 1460.

Approval of this lack of a seniority system and of the peculiar nature of Buncher's business is quite evident in the particular wording of the Board's decision and order quoted above, to which we explicitly referred in enforcing the order, 316 F. 2d at 929. In light of these prior findings and after an examination of the testimony supporting the

back pay computation,[11] we think that the instant use of seniority to compute the back pay was arbitrary and unreasonable. The full award of back pay, as computed in the Regional Director's Backpay Specification, cannot be justified solely by the prior finding of a violation of § 8(a)(3). The unfair labor practice proves only that some back pay is owed; if the precise amount cannot be determined, the Board's approximation must nonetheless have a rational basis. This basis for the back pay does not become more rational because the trial examiner rejects the employer's evidence as subjective and self-serving. The General Counsel's case, even when labelled "prima facie", must stand on its own.

Not only is there not substantial evidence to support the seniority system used to calculate the back pay, but the sole reliance on such a seniority system (and its "ground rule" that a seven-day layoff would break seniority, but only for purposes of determining seniority up to January 14, 1960) is in contradiction to other and previous findings concerning Buncher's business operation which were based upon substantial evidence in the record as a whole.[12]

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[11] This testimony covered approximately 50 transcript pages (as contrasted with management testimony covering approximately 700) and showed that the seniority-based back pay calculation rested on unsubstantiated assumptions such as seven days of layoff breaking seniority and the date of last hire, as opposed to original hire, being the crucial date. The compliance officer who testified stated that he paid no regard to the type of work available and that the seven-day layoff "rule" was not used consistently but only to establish seniority as of 1/14/60 and not for seniority changes thereafter.

[12] *Universal Camera Corp. v. Labor Bd.*, 340 U. S. 474, 491 (1951). We note, for instance, in the trial examiner's first supplemental decision, fn. 17, he observed that:

> "The General Counsel introduced into evidence General Counsel's Exhibit No. 3 in an attempt to demonstrate that, during a reduction in force in 1957, Respondent 'basically' utilized seniority in effecting the reduction at the Nine Mile Run location. This attempt proved abortive. The Exhibit shows that 34 employees were employed on the date of the layoff, and 16 of them were separated. Nine of these employees, including a discriminatee, were laid off out of context with their seniority."

Opinion of Court of Appeals, June 27, 1968, Denying Enforcement of Board's Order.

The Board and the trial examiner may be correct in rejecting an employer calculation that is ultimately based solely on subjective evaluation.[13] However, at least some of the allegedly important factors in Buncher's evaluation, of which Buncher employees' jobs would have been terminated due to economic cutbacks and the dates of such terminations, are capable of objective proof by means other than testimony and cross examination of members of the employer's management. The number of jobs employees have performed, their willingness to transfer to other plants, rates of pay, limitations on their availability, experience with Buncher, and experience with other employers are examples of criteria suggested by Buncher, which may be obtained by interviewing employees, including the discriminatees, and by using documentary and other evidence. Such factors (and possibly others), if challenged, thus appear capable of "objective" proof. The Regional Director can secure such information, affidavits, etc., and can augment calculations based on relative length of service with Buncher in order to make the back pay calculation a more rational approximation in light of the demonstrated, peculiar characteristics of Buncher's business operation.[14]

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[13] This position that subjective or non-objective standards are not acceptable is perhaps proper in a case of this type as a corollary of the established principle that the employer has and keeps all the records and, accordingly, must satisfactorily explain any ambiguities. *E.g., N. L. R. B. v. Mastro Plastics Corporation, supra,* at 176. See, also, *International Trailer Company, Inc.*, 150 N. L. R. B. 1205, 1209 (1965).

[14] Other Board back pay formulas such as the "comparable employee" formula, *East Texas Steel Castings Company, Inc.*, 116 N. L. R. B. 1336, 1337 (1956), enforced 255 F. 2d 284 (5th Cir. 1958), or the "representative employee earnings test," *N. L. R. B. v. Charley Toppino and Sons, Inc., supra,* at 97, may be adaptable to the facts in this case, particularly in some combination with a seniority system that conforms more to Buncher's practice.

Moreover, such a Backpay Specification may be capable of more meaningful examination before the trial examiner so that he would not be faced with the dilemma, which he apparently thought confronted him in this case, of approving all or none of the Regional Director's back pay approximations.

In denying enforcement of the order and returning the controversy to the Board, we need not rule on whether the determination that Buncher had admitted liability for back pay up to May 12, 1960, was in error. While we have doubts of the propriety of this determination if based, as it appears, solely on the grounds that Buncher sought to relitigate the unfair labor practice proceeding,[15] a new Backpay Specification might make this issue moot.

A decree will be entered denying enforcement and remanding to the NLRB for proceedings in light of this opinion.

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[15] The present case does not, for example, seem to fit the situation in *N. L. R. B. v. United States Air Con. Corp., supra;* and *N. L. R. B. v. Biscayne Television Corporation, supra.* The thirteen illegal discharges in this case occurred between January 15 and March 4, 1960, and it is not relitigation to contend, for instance, that employees illegally discharged in January might have been legally discharged subsequent to that date but prior to March 4, or prior to May 12.

We note that the General Counsel's Exhibit #14 showed a sharp drop in employment at the Nine Mile Run plant from a 1/7/60 high of 34 to an 8/4/60 low of 15, with a rather consistent number of 22 from 2/25 to 5/12 before the total became 18 or under until December 1960 (with one exception). Similarly, Exhibit #11 showed a drop of the total at all three Buncher operations from a 1/7/60 high of 73 to a 5/10/61 low of 41, with a frequent total of 48 during the period after 5/5/60.

Opinion of Court of Appeals, June 27, 1968, Denying Enforcement of Board's Order.

SEITZ, Circuit Judge, dissenting.

Where it has been established, as here, that an employer has discharged employees discriminatorily, but he claims in mitigation of back pay that they would have been laid off even absent such discrimination, he has the burden of proving that fact. The examiner offered and the employer took full advantage of the opportunity to meet his burden of producing credible evidence from which a remedial formula might be adopted by the Examiner to approximate the result in the absence of discrimination.

A chart, prepared after the fact, was introduced into evidence by the employer. It listed numerous non-discriminatory factors and evaluations concerning his employees during the pertinent period which tended to support the employer's contention that none of the discharged employees would have been rehired. He also offered elaborate supporting testimony. The Examiner found, with substantial record support, that the employer's evidence contained so many pervasive infirmities that it was not a reliable basis for deciding the back pay issue. The Examiner was therefore confronted with a situation in which the General Counsel had made out a prima facie case for relief and the employer had not sustained the burden imposed upon him.

The matter being in this posture, was it arbitrary or unreasonable for the Examiner to apply the seniority rule suggested by General Counsel? Admittedly, this employer did not have a formal seniority system. But the record in this case does indicate that length of service was a factor in his employment "policy." Furthermore, the

seniority standard represents "normal industrial practice generally." NLRB v. Kartarik, Inc., 227 F. 2d 190 (8th Cir. 1955). Thus, in my view, considering the status of the evidence, the seniority standard was a rationally permissible device for the Examiner to use in fashioning the remedy.

The majority find that there is no substantial evidence to support the use of the seniority formula and go further to find that its use was in contradiction to other and previous findings of the Board which are said to have substantial evidentiary support. In my view, these conclusions fail to give appropriate recognition to the manner in which these proceedings unfolded. Certainly the previous findings of the Board showed that the employer did not have a formal seniority system. But it does not follow that the use of such a factor in molding relief is automatically unreasonable where the employer, though having the burden and given the opportunity, has failed to supply credible evidence in support of some other method of approximating the situation absent discrimination. Having in mind that the Examiner was seeking an approximation, rather unrealistic at best, the remedy is not objectionable merely because it may not be consistent with the work histories, etc. of some of the employees involved. Indeed, since, in my view, it has sufficient evidentiary support, I question the court's legal right to reject the remedy adopted by the Board.

The majority are sending the matter back for the possible development of certain factors which they say are capable of "objective proof." They are doing this even

though the employer had a full and fair opportunity to make his record in this already protracted proceeding. I question both the legal status and evidentiary benefit of this direction under these circumstances. Since the burden here was admittedly on the employer, and since he failed to carry that burden, I think the Examiner and the Board properly adopted the seniority device as a rational remedy on this record. I would therefore deny the petition to review and set aside the Board's order and grant the Board's cross-petition to enforce its order.

A True Copy:

Teste:

....., *Clerk of the United States Court of Appeals for the Third Circuit.*

APPENDIX E

Supplemental Decision and Order of the National Labor Relations Board, 164 NLRB No. 31

On June 30, 1961, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] finding that Jack G. Buncher, d/b/a The Buncher Company, herein called the Respondent, had engaged in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and directing, *inter alia,* that Respondent offer immediate and full reinstatement to certain employees, dismissing, if necessary, all employees hired after March 4, 1960, and further directing Respondent to make whole the reinstated employees for any loss of pay they may have suffered as a result of the discrimination. Thereafter, the Board's Order was enforced by the United States Court of Appeals for the Third Circuit.[2]

On August 31, 1964, the Regional Director for Region 6 issued a backpay specification and notice of hearing. Pursuant to notice, a hearing was held before Trial Examiner Max Rosenberg to determine the amount of backpay due. On August 6, 1965, the Trial Examiner issued his Supplemental Decision, attached hereto, in which he awarded specific amounts of backpay to the thirteen discriminatees, and recommended the dismissal of the backpay specification insofar as it is relied exclusively upon seniority to support the backpay periods and computations on and after May 12, 1960. On January 13, 1966, the Board issued an Order reversing the Trial Examiner's findings and conclu-

[1] 131 NLRB 1444, as clarified by the Board's Order of September 22, 1961.

[2] *N. L. R. B. v. Jack G. Buncher, d/b/a The Buncher Company,* 316 F. 2d 928 (C. A. 3).

sions with respect to that portion of the backpay specification relating to periods subsequent to May 12, 1960, and remanded the proceeding to the Trial Examiner for further findings and the issuance of a Second Supplemental Decision.

On May 23, 1966, the Trial Examiner issued his Second Supplemental Decision, attached hereto, in which he awarded specific amounts of backpay to the thirteen discriminatees for periods subsequent to May 12, 1960. Thereafter, the Respondent filed exceptions to the Trial Examiner's Second Supplemental Decision, and a brief in support thereof, and the General Counsel filed a brief in support of the Decision.

Pursuant to the provisions of Section 3(b) of the National Relations Act, as amended, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.[3] The Board has considered the Trial Examiner's Supplemental

[3] At the hearing the Respondent moved to amend or clarify its answer to assert that the discriminatees would have been laid off due to lack of work on March 10, 1960, although it admitted that the first reduction in force took place on May 12, 1960. The Trial Examiner denied the motion as untimely, and noted the Respondent's original Answer had admitted that May 12, 1960, was the date of the first economic reduction in force subsequent to the last discriminatory layoff. The Trial Examiner further commented on his ruling in his Supplemental Decision, characterizing the motion to amend the Answer as an attempt to relitigate an issue decided in the unfair labor practice proceeding. We agree with the Trial Examiner's ruling. Respondent's assertion that the discriminatees would have been laid off on March 10, or at any time before the date of the economic reduction in force, is merely an attempt to relitigate the asserted justification for the selection of the employees for the initial layoffs, a selection which the Board and the Court have already found to be discriminatory.

Decision, the Second Supplemental Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified by his Second Supplemental Decision, with the comments noted hereafter.

In its initial decision in this case, the Board recognized the possibilities of a subsequent economic reduction in force which might have resulted in the layoff of some of the discriminatees even absent the Respondent's unfair labor practices. As a result, in fashioning a remedy for the unfair labor practices, the Board stated:

> If there is not then sufficient work available for the remaining employees and those offered reinstatement, all available positions shall be distributed among them without discrimination against any employee because of concerted activities, in accordance with the system of seniority or other nondiscriminatory practice heretofore applied by the Respondent in the conduct of his business. The Respondent shall place those employees, if any, for whom no employment is available after such distribution on a preferential list, with priority in accordance with such system of seniority or other nondiscriminatory practice heretofore applied by the Respondent in the conduct of his business, and thereafter offer them reinstatement as such employment becomes available and before other persons are hired for such work.[4]

[4] *The Buncher Company*, 131 NLRB 1444 at 1445.

Supplemental Decision and Order of the National Labor Relations Board, 164 NLRB No. 31.

Generally, the burden of alleging and proving that jobs were not available for all the discriminatees during the backpay period is placed on the respondent.[5] The backpay specification subsequently issued by the General Counsel alleged that the utilization of a system of seniority was an appropriate method to determine the availability of work for the discriminatees on and after May 12, 1960, the date of the first economic reduction in force subsequent to the last discriminatory layoff. The Respondent contends that it did not have a seniority system and would not have used such a system to select employees for the retention, layoff, or recall. The Respondent's alternative theory of the basis for such layoffs is, in fact, an affirmative defense in which it contends that all of the discriminatees would have been laid off on May 12, 1960, and not recalled.

In solving many of the problems which arise in backpay cases, the Board occasionally is required to adopt formulas which result in backpay determinations that are close approximations because no better basis exists for determining the exact amounts due. However, the fact that the exact amount due is incalculable is no justification for permitting the Respondent to escape completely his legal obligation to compensate the victims of his discriminatory actions for the loss of earnings which they suffered. In general, courts have acknowledged that in solving such backpay problems, the Board is vested with wide discretion in devising procedures and methods which will effectuate the purposes of the Act and has generally limited its review to whether a method selected was "arbitrary or unreasonable in the cir-

[5] *Mastro Plastic Corp.*, 136 NLRB 1342, enfd. 354 F. 2d 170 (C. A. 2).

cumstances involved,'"[6] or whether in determining the amount, a "rational" basis was utilized.[7]

Before the backpay specification was issued herein, the Respondent maintained that personal judgment or personal evaluation of each employee's capabilities was the method used in selecting employees for retention, layoff, or recall. As the Respondent maintained no written records which would support such contentions, General Counsel's complete acceptance of Respondent's position at this point would have in effect amounted to a substantial abandonment of backpay claims even prior to a hearing on the extent of Respondent's backpay liability. As an alternative, the General Counsel reverted to an objective standard of determining backpay, namely, the use of seniority, to determine the availability of employment for the discriminatees on and after May 12, 1960, and utilized such standard in the backpay specification. However, Respondent was not thereby precluded from adducing evidence in support of its position at a subsequent hearing and, in fact, it was not until the Trial Examiner issued a Show Cause Order that the Respondent set forth the specific criteria it allegedly used in making selections of individuals for retention, layoff, or recall.[8]

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[6] *N. L. R. B. v. Brown & Root, Inc.*, 311 F. 2d 447, 452 (C. A. 8).

[7] *N. L. R. B. v. Kartarik, Inc.*, 227 F. 2d 190, 193 (C. A. 8).

[8] The Respondent's employment criteria chart was prepared specifically for these proceedings and in response to the Trial Examiner's Show Cause Order, and purported to show the manner in which all of Respondent's employees met certain criteria for retention or recall. The chart was constructed in November 1964, on the basis of personal recollections of Respondent's several supervisors and covered approximately 225 employees over a span of more than 4½ years. The testimony of the supervisors themselves was based on their recollection as refreshed by the chart which they helped to create. Like the Trial Examiner, we conclude the probative value of the chart and testimony relating thereto must be assessed accordingly. See, *International Trailer Company, Inc.*, 150 NLRB 1205 at 1209.

Supplemental Decision and Order of the National Labor Relations Board, 164 NLRB No. 31.

Respondent's objection to the use of seniority as a basis for determining the amounts of backpay due in individual cases is that it is arbitrary because it is directly contrary to Respondent's asserted system of selection of its individual employees for layoff and recall. The Respondent's system has been discredited. Because it is thus impossible to determine with precision the amount of lost pay in any individual instance, the result of Respondent's argument would apparently be that it should be excused from reimbursing its employees for any lost pay, or, possibly that in no individual case should the reimbursement exceed the least amount of pay lost by any employee as determined by application of the seniority rule.

Such a result would permit Respondent to profit by its own wrong, at the expense of the employees whom it injured. The finding that the discharges were discriminatory necessarily establishes a pay loss by the employees for, without the discrimination, the selection would not have been made until some point later in time. Some measure of backpay is therefore required in order to effectuate the purposes of the Act.

As the Supreme Court has held in Biglow, et al. v. RKO Radio Pictures, Inc., 327 U. S. 251, 264-6, where a precise computation is impossible, it is appropriate to

> make a just and reasonable estimate of the damage based on relevant data. . . . Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete

in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

The most elementary conceptions of justice and public policy require that the wrongdoer should bear the risk of the uncertainty which his own wrong has created . . . That principle is an ancient one . . .

"The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with the right of recovery" for a proven invasion of the plaintiff's right. *Story Parchment Co.* v. *Paterson Co.*, [282 U. S. 555 at] 565.

Admittedly, the utilization of seniority here results in an inexact measure of backpay liability. However, it is no more inexact than would be the use of Respondent's "personal judgment" in determining layoffs and recall, a method the Trial Examiner rejected, because he found it was contrived to avoid reemploying the discriminatees. In these circumstances, any measure used to determine backpay will be inexact and arguably arbitrary. It is Respondent's violation of the Act which requires the Board to apply a remedy that in its judgment offers a reasonable basis for remedying the violation found. The extensive use of seniority by other employers in determining layoff and recall, the objective nature of the seniority system, and the complete absence of an alternative offered by the respondent other than personal judgment, made the General Counsel's utili-

zation of seniority in framing the backpay specification not unreasonable. The backpay specification, in any event, did not foreclose the Respondent from establishing a more reasonable alternative theory on which backpay could be calculated.

The Respondent, through testimony of its witnesses and an employment criteria chart, sought to establish that the failure to retain or recall any one of the discriminatees in the period from May 12, 1960, until January 1962, was based on nondiscriminatory consideration. The Trial Examiner rejected Respondent's defense that all of the discriminatees would have been laid off for nondiscriminatory reasons on May 12, 1960, and not recalled because the record, including, *inter alia*, the employment criteria chart and the testimony of Respondent's witnesses, contained inconsistencies and implausibilities which led the Trial Examiner to conclude that "the charted information was contrived for the purpose of denying backpay" to the discriminatees.

We agree with the Trial Examiner that the Respondent's failure to retain or recall any of the discriminatees was not because of the asserted inability of all the discriminatees to satisfy the employment criteria. We note that Respondent's owner, Jack Buncher testified in the original unfair labor practice proceeding that there was nothing seriously wrong with the work of the discriminatees, that he never had any serious complaints concerning their work, and that he would rehire them if needed. Yet Respondent's employment criteria chart indicates that approximately 17

new employees[9] were hired from May 12, 1960, through January 12, 1962, the date the discriminatees were offered reinstatement, and that, in addition, several former employees were recalled to work during that period of time. Moreover, the Respondent admittedly trained employees in new skills without offering such training to the discriminatees, although some of them were rated "superior" in ability to learn by the Respondent's own standards. Additionally, the employment criteria chart indicates that at least three employees (not discriminatees) were accorded "superior" ratings for attitude although one of Respondent's supervisors testified that "those boys were fired so many times for absenteeism" that he was unable to give an accurate account of the firing.

The record also discloses incidents of exaggeration of skill requirements for jobs by the Respondent in an apparent effort to upgrade the skills of employees who were retained in preference to the discriminatees. Further, Respondent's employment criteria chart, by a unique coincidence, disqualifies *all* of the discriminatees for backpay subsequent to May 12, 1960. In sum, we conclude that Respondent's affirmative defense did not rebut the *prima facie* case established by the General Counsel and that, under all of the circumstances, seniority was a reasonable method of establishing the Respondent's backpay liability.

[9] Not including 11 men employed for a special project for a brief period during the summer of 1960.

Supplemental Decision and Order of the National Labor Relations Board, 164 NLRB No. 31.

ORDER

Pursuant to section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommendations of the Trial Examiner as set forth in his Second Supplemental Decision, and orders that Respondent, Jack G. Buncher, d/b/a The Buncher Company, Pittsburgh, Pennsylvania, his agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommendations.

Dated, Washington, D. C. May 4, 1967.

JOHN H. FANNING, *Member,*
GERALD A. BROWN, *Member,*
HOWARD JENKINS, JR., *Member,*

(SEAL) NATIONAL LABOR RELATIONS BOARD.

APPENDIX F

Trial Examiner's Second Supplemental Decision, May 23, 1966

STATEMENT OF THE CASE

On August 6, 1965, I issued a Supplemental Decision in the above-styled proceeding in which I found that the named discriminatees were entitled to specific amounts of backpay from the dates of their discrimination to May 12, 1960, with interest thereon at the rate of 6 percent per annum. I also found that the first economically motivated reduction in force following the discrimination occurred at Respondent's installations on May 12, 1960. In his Backpay Specification, as amended at the hearing,[1] the General Counsel alleged that most of the discriminatees were entitled to further amounts of backpay for varying periods following May 12, 1960 because, through the utilization of the standard of seniority, as therein defined, they would have continued in Respondent's employ during said periods in preference to other employees who possessed less seniority than the discriminatees.[2]

At the hearing, the Respondent moved to dismiss the Backpay Specification on the ground that it was legally defective inasmuch as the backpay periods and computations contained therein rested solely on the premise that Respondent would have utilized seniority in effecting the reduction in force on May 12, 1960. In support of this motion, the Respondent asserted that; in the original un-

[1] The amendment, which is General Counsel's Exhibit No. 2, operates to reduce the Respondent's backpay liability in certain respects.

[2] The Specification does not claim backpay for discriminatee Milton Ashford after May 12, 1960 because, based upon his seniority, the General Counsel conceded that there was no work available for him at any of Respondent's facilities thereafter.

fair labor practice proceeding, the Board and the United States Court of Appeals for the Third Circuit affirmed the Trial Examiner's findings of fact that the Respondent did not solely utilize seniority in enlarging or curtailing its work force in the course of its business operations. Because of the apparent novelty of the question posed, I reserved ruling on the motion and put Respondent to its proof as to the criteria which it employed in determining whether employees were to be laid off, retained, or recalled, and the manner and degree in which the discriminatees failed to satisfy those criteria as contrasted with each and every employee who was retained, employed, or recalled since May 12, 1960 in preference to the discriminatees. However, in the Supplemental Decision, I dismissed the Backpay Specification insofar as it alleged that the discriminatees were entitled to backpay on and after May 12, 1960 because, in my view, it was unreasonable and arbitrary for the General Counsel to rely upon seniority as the sole predicate for his computations in light of the previous findings of fact by the Trial Examiner, the Board, and the Court, that Respondent did not utilize that standard in the operation of its business facilities. Because of the dismissal of this aspect of the Specification on this ground, I deemed it unnecessary to consider whether the discriminatees would have lost their jobs in the reduction in force of May 12, 1960, or failed to regain them because they would not have satisfied the nondiscriminatory criteria which Respondent advanced.

By order dated January 13, 1966, the Board remanded this proceeding to the undersigned Trial Examiner. In doing so, it concluded that "an absence of the use of senior-

ity by the Respondent does not render the General Counsel's utilization of seniority in this proceeding arbitrary or unreasonable . . .," and directed that I prepare and issue a Second Supplemental Decision setting forth "the findings, conclusions, and recommendations with regard to backpay, if any, to which the discriminatees are entitled for the period or periods subsequent to May 12, 1960." As I construe the Order of Remand, the Board has determined that the General Counsel's reliance upon seniority to support his backpay periods and computations, as defined in the Backpay Specification, was legally appropriate, and that the Specification made out a *prima facie* case of Respondent's monetary indebtedness to the discriminatees in the amounts set forth therein. Accordingly, in view of my prior rulings upon the General Counsel's Motion to Strike Portions of Respondent's Answer to Backpay Specification and Motion for Judgment on the Pleadings; on the basis of the initial Supplemental Decision herein; and, in light of the Board's remand as thus construed, the only issue before me in this litigation is whether the Respondent has sustained its burden of showing by preponderant proof that all the discriminatees would necessarily have been laid off in the economic reduction in force on May 12, 1960, and would not have been reemployed thereafter, for reasons wholly unrelated to their union activities, because they failed to satisfy Respondent's asserted qualifications for the retention or recapture of employment.

Upon the entire record made in this proceeding and my observation of the witnesses, including their demeanor while on the stand, I hereby make the following supplemental findings, conclusions, and recommendations.

Trial Examiner's Second Supplemental Decision, May 23, 1966.

I. Supplemental Findings and Conclusions

A. *Respondent's business operations*

Respondent is engaged in the business of scrap breaking, scrap reclamation, and the construction and leasing of industrial buildings in and around Pittsburgh, Pennsylvania. In addition, Respondent also engages in the business of demolition and salvage of buildings, bridges, and industrial plants; operates and maintains a river port at which it receives and ships various materials; and, operates facilities for the storage and transfer of various commodities. During the times material to this proceeding, Respondent conducted its operations principally at three locations.[3] The oldest facility is situated at Shore Avenue, North Side, Pittsburgh, and is commonly referred to as the "Yard." The principal activity at the Yard involves the receipt, storage, processing and shipment of ferrous and nonferrous scrap materials obtained from the salvage and demolition of structures, and the fabrication of metal members which are utilized in the erection of buildings. The Yard also houses the principal offices of Respondent, and serves as the headquarters for the so-called "outside" operations which include the demolition and salvage of structures. Located at the Yard are such pieces of equipment as a large gantry crane, car moving winches, a scrap cutting shear, magnets, drop balls, hand tools, a lead melting oven, a small lead pigging machine, and two heavy duty trucks equipped with power winches which transport heavy steel members and other heavy equipment to various project sites.

[3] In 1963, the Respondent undertook the construction of a fourth facility at Glenwood, Pennsylvania, which consisted of a coal dock.

Trial Examiner's Second Supplemental Decision, May 23, 1966.

Another facility is maintained by Respondent at Nine Mile Run in Pittsburgh, Pennsylvania, which is normally referred to as "Nine Mile." This installation is basically a slag processing operation and consists of two plants located on a slag dump owned by the Duquesne Slag Company.[4] The function of these plants is to reclaim and separate iron from a waste material known as "slag," which is obtained from the Duquesne dump and a nearby Jones and Laughlin mill. To extract the ferrous material from the raw material, the slag is dug from the dump through the use of power shovels or high lifts and loaded onto trucks which are owned and operated by an independent contractor. The trucks transport the slag to the plants where it is deposited into two chutes or hoppers for processing. Once in the plants, the slag is placed on conveyor belts and, through the employment of shakers, magnetic separators and a kiln, the "fines" or reclaimed ferrous metal is extracted and loaded into railroad cars by the hi-lifts while the residue or "spoil" is diverted by a conveyor to a spoil gate where it is placed into trucks and transported away for disposal. To maintain the plants and the heavy equipment located at Nine Mile, Respondent operates a repair shop which contains machine tools and welding devices; operates a lubrication truck and a mobile welding unit; and, utilizes a "water wagon" to sprinkle the dust in the area. In 1961, Respondent began operating a "fines" plant.

The third facility which Respondent maintains is located at Leetsdale, Pennsylvania. Leetsdale is an industrial complex consisting of buildings, warehouses and plants

[4] On May 12, 1960, one of these plants was closed down.

which Respondent constructs and leases to industrial tenants. Employees of the Respondent are designated to perform the carpentry work, install foundations, and do the brick, concrete, and block work, as well as the sheet roofing work. Other phases of construction are accomplished by subcontractors. Respondent also constructed and operates a large river dock equipped with gantry cranes and other hoisting equipment where industrial machinery and other materials of various dimensions are loaded or unloaded from river barges. In addition, Leetsdale contains a structural steel warehouse, a steel fabricating shop, and a scrap yard and storage yard. In its operations, Leetsdale uses such equipment as four gantry cranes, crawler type cranes, dragline cranes, steel erection cranes, overhead cranes, hi-lifts, forklift trucks, road rollers, graders, and a variety of tools.

B. *The contentions*

I have heretofore found in the initial Supplemental Decision that all the discriminatees were entitled to backpay in the specified amounts there set forth from the dates of their discrimination until May 12, 1960, the date on which an economic reduction in force occurred at Respondent's installations.[5] The General Counsel contends that most of the discriminatees are entitled to backpay for various pe-

[5] The dates of discrimination for the various discriminatees are as follows:

John A. Cindrick, 1-16-60
James H. Roth, 1-16-60
Milton Ashford, 1-16-60
Henry Ivy, 1-16-60
Joseph Wytiaz, 1-16-60
George Collier, 1-19-60
Robert Vinsick, 1-20-60
Ronald Loughner, 1-20-60
Samuel Rutherford, 1-30-60
Archie Jackson, 2-13-60
John West, 2-13-60
William Greene, 2-20-60
James Cindrick, 3-5-60

riods after May 12, 1960.[6] Thus, the Backpay Specification alleges that, when sufficient work was not available at Nine Mile (where the discriminatees normally worked) after May 12, 1960 for all the discriminatees and all other employees who were employed at Nine Mile at the time of the discrimination, each discriminatee's entitlement to backpay after that date should be determined by allocating the available jobs at Nine Mile among the discriminatees and other employees in accordance with their seniority as therein defined. If sufficient work was not available to a discriminatee after such allocation, then his entitlement should be assessed by allocating all available jobs at Nine Mile, Leetsdale, and the Yard, among the discriminatees and other employees at all locations in accordance with their seniority. Based upon the utilization of this seniority standard, which the Board approved in its remand, the General Counsel urges that jobs were available for discriminatees Greene, James Cindrick, John A. Cindrick, Collier, and Ivy at Nine Mile throughout their backpay pe-

[6] On January 12, 1962, discriminatees Greene, James Cindrick, John A. Cindrick, Collier, West, Jackson, Roth, and Ashford declined Respondent's offer of reinstatement to jobs at Leetsdale. The backpay period for these individuals concededly terminates on that date. Discriminatee Vinsick accepted Respondent's offer on that date but quit his employment on September 1, 1962, which constitutes his backpay terminal date. Discriminatees Ivy, Rutherford, Loughner, and Wytiaz also accepted Respondent's reinstatement offer at Leetsdale where they manually broke slabs of manganese ore into smaller pieces with the use of a sledge hammer. The General Counsel asserts that their backpay continues to run from January 12, 1962 because substantially equivalent employment and hours of work, which existed at the time of their discrimination, were available for them at Nine Mile after that date, and no offer of reinstatement at said location has been made to them. However, the wages received by these individuals at Leetsdale have been treated as interim earnings in the backpay computations.

The Specification, as noted hereinabove, does not claim backpay for Ashford for any period following May 12, 1960. Accordingly, while the backpay period for this discriminatee technically runs to January 12, 1962, the date of Respondent's reinstatement offer, Ashford's entitlement to backpay from May 12, 1960 will be dropped from consideration in this Decision.

riods; that jobs were available on and after that date for discriminatees Loughner, Rutherford, Vinsick, and Wytiaz either at Nine Mile, Leetsdale, or the Yard throughout their backpay periods; and, that jobs were available on and after that date for discriminatees West, Jackson and Roth either at Leetsdale or the Yard throughout their backpay periods.

In response to my Order to Show Cause dated October 23, 1964, and again at the hearing and in its brief, the Respondent challenged the General Counsel's assertion that the discriminatees' seniority alone would have entitled them to employment after May 12, 1960 in preference to other individuals. In this connection, Respondent asserted that the following criteria were utilized to determine whether to retain or reemploy employees; (1) ability to perform available work; (2) rate of pay; (3) productivity; (4) application to work; (5) attitude toward work and willingness to learn; (6) ability to learn new skills; (7) limitation on availability; (8) experience with the Respondent; (9) experience with other employers; and (10) relative length of service with Respondent. Accordingly, Respondent contends that all the discriminatees would necessarily have been laid off on May 12, 1960, and none would have been recalled thereafter, because they failed to meet these criteria to the same degree as the employees who were retained, recalled, or were newly hired.

C. *Legal precepts*

Before considering the evidence adduced in this proceeding, I deem it important to set forth in brief the legal principles which govern the nature and quantum

of proof which Respondent must here advance. It is now established doctrine that an employer who has discriminated against employees in violation of Section 8(a)(3) of the Act assumes the same position as a conventional tortfeasor. Damages by his wrongful acts having been established in prior unfair labor practice proceedings, the burden of proof in diminution of such damages rests upon the wrongdoer.[7] This is particularly true in situations where the issue concerns job availability at an employer's plant for discriminatees during the period following their discrimination. In Mastro Plastics Corp., the United States Court of Appeals for the Second Circuit characterized this burden as "an affirmative defense in the traditional sense of that term and a part of the employer-respondent's case."[8] As that tribunal explained, "To establish that an employer has reduced or adjusted his business to an extent eliminating the job of a discriminatee requires careful analysis of the books and records of the employer during the back pay period. . . . it is the employer who kept the records and who therefore is able to explain them and to interpret any ambiguities they may contain."[9] These observations were echoed by the United States Court of Appeals for the Fifth Circuit in N.L.R.B. v. Charley Toppino & Sons, Inc.[10]

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[7] See *W. C. Nabors Company*, 134 NLRB 1078, 1085, enf'd as mod., 323 F. 2d 686 (C.A. 5), cert. denied 376 U. S. 911.

[8] 354 F. 2d 170, 175-176.

[9] *Ibid.* at p. 176.

[10] ____ F. 2d ____ (C. A. 5), 61 LRRM 2655.

Trial Examiner's Second Supplemental Decision, May 23, 1966.

To sustain an affirmative defense that discriminatees would not have been retained in its employ because of an economic reduction in force following the date of discrimination, an employer must come forth with clear and convincing evidence to support its contentions. "[M]ere self-serving and conclusionary statements" that an employer would have laid off or refused to recall backpay claimants for nondiscriminatory reasons cannot operate to deprive them of their remedial rights.[11] And, if any uncertainty exists concerning the availability of work for discriminatees, this flows from the employer's illegal actions and is to be resolved against him rather than the victims of those actions.[12] Moreover, a discriminatee's right to continuing employment, uninterrupted by discrimination, encompasses "the right to compete on a nondiscriminatory basis for continuing employment in identical or substantially equivalent work, with those of his fellow employees who had held positions identical to his own at the time of his discharge."[13] Hence, an employer may not defend the denial of continued employment to discriminatees on the ground that their replacements or incumbent employees were more desirable or more competent workers.[14] Furthermore, it is no de-

[11] See *W. C. Nabors Company*, 134 NLRB 1078, 1088.

[12] See *Ozark Hardware Company*, 119 NLRB 1130, 1133, enf'd 282 F. 2d 1 (C. A. 1).

[13] See *Underwood Machinery Company*, 95 NLRB 1386, 1392, enf'd 179 F. 2d 148 (C. A. 1).

[14] As the Board observed in *Interurban Gas Corporation*, 149 NLRB 576, 578, "We consider it quite irrelevant whether Allen [a replacement] is more competent than either of Respondent's former servicemen. If [discriminatee] Gillingham's reinstatement means that Allen is a superfluous employee, this is a hazard that Respondent should have foreseen." And see *Flora and Argus Construction Company*, 149 NLRB 583, 585, where, in answer to the employer's assertion that the discriminatees would not have been retained, absent discrim-

(Footnote continued on following page)

fense to a backpay claim that an employer's business operations were carried on more successfully with a reduced work complement after his discrimination.[15] With these teachings in mind, I now turn to the evidence which Respondent adduced in defense of this action.

D. *The evidence*

In proof of its affirmative defense, Respondent prepared a chart purporting to show the manner in which each employee, including the discriminatees, but excluding watchmen, guards, and office clericals, did or did not satisfy Respondent's criteria for the retention of or recall to, employment.[16] This chart, which was amplified primarily through the testimony of Herbert Green, Respondent's General Manager, as well as Jack G. Buncher, Respondent's sole proprietor, and Superintendents Moses Pasquarelli and Albert Kohan, contains the names of employees who ap-

(Footnote continued from preceding page)
ination, because they were incapable of performing the jobs which had to be filled at the employers' projects, the Board noted: "The answer to this argument is simply that there is now no way to verify its truth or accuracy. The seven discriminatees were hired and were paid to carry out the duties assigned to them, and were terminated, not for failure to perform satisfactorily, but for discriminatory reasons. . . . Respondent made no attempt to test its asserted reason that the discriminatees did not have the capability for working out satisfactorily on the remaining work at the project. It is true that the Act imposes no obligation on an employer to retain an inefficient employee or one who is incapable of carrying out assigned duties. But where, as here, an employer has unlawfully discharged employees, foreclosing the opportunity its discharged employees would otherwise have to demonstrate their fitness for future tasks and thereby precluding a reliable determination of their future suitability, the employer is scarcely in a position to assert that it would not have continued to utilize such employees on jobs within their classification even in the absence of discrimination."

[15] See *N. L. R. B. v. Biscayne Television Corporation*, 337 F. 2d 267, 268 (C. A. 5).

[16] See General Counsel's Exhibit No. 1(y).

peared on the payrolls beginning on January 14, 1960 (immediately preceding the first instance of discrimination) until November 30, 1964.[17] Each employee is listed in order of his original hiring date. Adjacent to the name of each such employee appears a qualitative, numerical rating ranging from 1 (superior) to 5 (not acceptable) for any of the detailed 52 job titles which the employee had performed.[18] Similar ratings are recorded for the other criteria Respondent advanced, such as ability to learn, attitude, application, production, etc. Finally, the chart lists the hourly wage rate paid to each employee, and contains a record of each employee's history of employment indicating layoffs and discharges. According to Green, the Respondent never maintained any written records over the years to memorialize the work abilities and attitudes of employees until the instant chart was prepared specifically for this proceeding, and hence the information and ratings contained therein are based exclusively upon the personal observation and knowledge of supervisors, and, primarily, supervisor Green. Inasmuch as the Respondent neither produced nor had available any written records to support the accuracy of the chart, and called no employee witnesses in support of its asserted defenses, the probity of Respondent's testimony as well as the chart itself must be tested against the backdrop of consistency, subjectivity, and plausibility, keeping in mind that Respondent's evaluation of its employees repre-

[17] The chart was prepared by Respondent in November 1964 in response to my Order to Show Cause why the Answer to Backpay Specification should not be dismissed, and was filed with me on November 30, 1964.

[18] These ratings run as follows: (1) superior; (2) above average; (3) average; (4) acceptable; and, (5) not acceptable.

sented a judgment expressed in November 1964 covering a range of several years.[19]

On January 14, 1960, immediately prior to the illegal discrimination, the Respondent had a complement of 34 employees at Nine Mile, and overall work force of approximately 73 at the three locations, namely, Nine Mile, Leetsdale, and the Yard. On May 12, 1960, the date of the economic reduction in force, the number of employees at Nine Mile decreased to 22, while the number at all three installations totalled 49. Between May 12, 1960 and January 12, 1962 (the date on which Respondent offered the discriminatees employment at Leetsdale), employment at Nine Mile averaged approximately 19 individuals per week. Between May 12, 1960 and March 26, 1964,[20] overall employment fluctuated between 41 and 54. During this latter period, 34 employees were either transferred to Nine Mile from other facilities, were rehired for work at Nine Mile, or were newly hired employees.

On and after May 12, 1960, Respondent had jobs available at Nine Mile for 2 hi-lift operators, a dragline operator, two shovel operators, 2 to 3 welders, a truck expeditor, and a fines plant operator, in addition to work for general maintenance men, oilers, painters, track workers,

[19] See, *e.g., International Trailer Company, Inc.*, 150 NLRB No. 118, TXD at p. 5: "Subjective testimony by management representatives in 1963 concerning the ability and skill of employees discharged in 1960 for union activity is not very reliable though it may be that the witnesses believe that they are expressing their honest opinions. In addition, the employer has an interest in reducing his liability as much as possible. Moreover, the claimants had aroused management's antagonism sufficiently to cause it to discharge them and such hostility does not disappear with the passage of time."

[20] Respondent's payroll and related records were not available for periods after this date.

and laborers. During the same period, Leetsdale and the Yard utilized hi-lifts, dozers, draglines, shovels, and a variety of cranes, and employed welders, mechanics and mechanics' helpers, truckdrivers, bargemen, laborers, painters and helpers on construction, shearmen, scrap burners, and scrap sorters. Despite the constriction of Respondent's work force after the dates of discrimination, it is clear on this record that work existed at Nine Mile, Leetsdale, and the Yard after May 12, 1960 which the discriminatees could have performed. Thus, Herbert Green testified that William Greene and the Cindricks were "excellent" dragline, dozer, hi-lift, and shovel operators and that this equipment was operated at Nine Mile during their backpay periods. Collier was represented by Greene as being capable of working as a truck expeditor as well as operating the shaker, kiln feed conveyor, and performing car loading and laboring work; Ivy and West were welders who also performed laborer's work; Rutherford had been employed as a car loader, shaker operator, spoil gate operator, scrap burner and shearman, and had also operated a hi-lift and dozer; Loughner, in addition to having worked as a laborer, general maintenance man and mechanic's helper, also operated the hi-lift and the dozer; Vinsick, who was an equipment operator, was also utilized as a laborer, oiler, and maintenance man; Wytiaz had been a truck expeditor, oiler, spray painter, mechanic's helper, general maintenance man and laborer, and additionally operated the hi-lift and dozer; and, Archie Jackson and Roth had performed work as laborers. Moreover, it is undisputed that, over the years, Respondent freely transferred employees between its three facilities, including dis-

criminatees Ivy, Rutherford, Wytiaz and West,[21] into various jobs.

In their testimony, Herbert Green, Buncher, Pasquarelli, and Cohen essayed to evaluate negatively the job capabilities and attitudes of the discriminatees in contrast to the employees who were retained on May 12, 1960, or recalled or hired thereafter, through utilization of the chart. This testimony was so fraught with inconsistencies, internal contradictions, exaggerations, and implausibilities, that I am convinced the charted information was contrived for the purpose of denying backpay to the claimants on and after the above date. Thus, one of Respondent's asserted criteria for the retention of employment during an economic reduction in force was the wage rate paid to employees. As explained by Green, if a choice were to be made between employees of equal ability, the employee receiving the lower rate of pay would be preferred over the one receiving the higher. Prior to the reduction in employment on May 12, 1960, the Respondent experienced only one other such employment curtailment which occurred on November 15, 1957 and which also was occasioned by a desire to reduce costs, so that this is the only episode by which to measure Respondent's assertion in this connection. Despite Respondent's contention that relative wage rates were one of the criteria utilized in determining which employees were to be retained in an economic reduction in force, Green conceded, and the record shows, that during the 1957 layoffs, Respondent retained discriminatees William Greene, James and John Cindrick,

[21] See General Counsel's Exhibit No. 10.

George Collier, and Henry Ivy, although they received relatively higher wage rates than such individuals as Thomas Frazier, Gambino Lopez, Gerald Hinger, Charles Epps, John Edditor, and Harland Shearer, who were terminated.

Respondent then attempted to explain that dichotomy by asserting that, since the layoffs in 1957, employees Hinger, Edditor and Lopez had acquired greater skills and had demonstrated more exemplary work attitudes than the discriminatees, and that this was the reason why they were retained during the backpay periods herein. However, the record conspires against these assertions. Respondent's chart assigns Hinger as 1 or "superior" rating as a hi-lift, dozer, dragline and shovel operator, and it indicates that he was discharged on February 27, 1961, without explanation. Nonetheless, Hinger's supervisor, Pasquarelli, testified that Hinger actually was discharged for having been negligent in servicing shovels. In Pasquarelli's words, Hinger "ran the shovel out of fuel, not only once, but three times. On the third time that is when I got rid of him. The other two times I swallowed my tongue, because I had to argue with Mr. [Herbert] Green about him all the time. But this time it was either he or I."[22] It should be noted that Hinger was chosen to replace James Cindrick when the latter was discriminatorily terminated on March 5, 1960, although James Cindrick was also rated 1 or "superior" as an equipment operator, and was testimonially

[22] Green stated that he hired and retained Hinger because Green was a friend of Hinger's father, and Pasquarelli testified that attempts to rid himself of Hinger were thwarted because of this friendship. Curiously, Respondent neither lists in its chart nor asserts in its testimony that "friendship" was a criterion for obtaining or retaining employment.

described by Herbert Green as an "excellent" shovel and equipment operator. Moreover, Respondent's records are singularly silent as to any critical reference to his work abilities or attitudes.[23] John Edditor is rated on the chart as a "superior" truck expeditor, as was George Collier. Following Collier's unlawful discharge, Edditor was selected to replace him on that job. Despite the facts that the task of a truck expeditor concededly became vastly more simplified after Collier's separation, and the "superior" rating which Respondent's chart assigns to Edditor, the latter was discharged on July 24, 1961 because of unsatisfactory work. Gambino Lopez is accorded a "superior" rating on the chart for production, application, and attitude, and is rated as having unlimited job availability. Albeit these ratings, Herbert Green testimonially admitted that excessive absenteeism "was historically the case" with Lopez, and that he had been discharged in 1958, and again on January 13, 1961, when he "was gone for a couple of weeks on a drunk," although the chart merely recites that Lopez "quit" on the latter date. Collier, who concededly could perform jobs which were assigned to Lopez, was given a lower rating for production, application, and attitude, notwithstanding his employment record was uninterrupted from the date of his hire in June 1955 until his discriminatory discharge on January 18, 1960. Respondent assigns an "average" attitude rating for Collier. According to Green, this rating was prompted by the fact

[23] Green exclaimed that James' attitude changed in some undefined way after his brother John had been discriminatorily discharged by Respondent on January 16, 1960. This change in attitude, if in fact it occurred, may be understandable. James was also singled out by Respondent for the identical discrimination visited upon his brother.

that Collier was observed perusing baseball books while at work and Green scolded him for it. However, this incident, which occurred sometime before Collier's discharge, and which Green attempted to magnify, did not result in any disciplinary action being taken against Collier.

Other inconsistencies, implausibilities and exaggerations appear on this record which further serve to undermine Respondent's affirmative defense. Clarence Ardrey, who received a "superior" rating on the chart as a hi-lift and dozer operator, but was unqualified as a dragline or shovel operator, was retained by Respondent in preference to William Greene and the Cindricks who were characterized by Herbert Green as "excellent" operators on all these pieces of equipment. Yet Respondent's records show that Ardrey was discharged on September 15, 1960, because he was negligent in the operation of this equipment. Jonathan Favor, who was generally rated as equal in ability with George Collier, was awarded a "superior" rating on attitude while the latter was characterized as "average," despite the fact that Favor was discharged by Respondent in June 1960 because he had been found stealing. Again, Anthony Robinson, Jr., who did "odd end jobs" at Nine Mile, and Robert and Gordon Taylor, who either had little seniority or were newly hired following the dates of discrimination herein, were accorded "superior" ratings for attitude although Herbert Green testified that "Those boys were fired so many times" for absenteeism that he was unable to give an accurate account of the firings. Nevertheless, discriminatees Ivy, Greene, and John Cindrick were rated merely as "acceptable" and Vinsick, Rutherford, and

Collier as "average" in attitude, although the chart in no way indicates that any of the discriminatees had ever been charged with absenteeism during the entire course of their employment.

That Respondent testimonially engaged in job skill "puffing" to glamorize the skills of employees who were retained in preference to the discriminatees in order to deny backpay to the claimants, is further pointed up by the testimony of Herbert Green. Thus, Green waxed ecstatic about the capabilities of Gambino Lopez who, as previously chronicled, was discharged on several occasions for absenteeism. Listening to Green testify as to Lopez' skills as a shaker operator in the plant at Nine Mile, one would gather that Lopez was a veritable giant in the field of metallurgical science, despite the fact that he was characterized on Respondent's records as a laborer. In his testimony in this proceeding, Green described the duties of a shaker as follows:

> "He operates the controls of this machine, but in addition to operating the controls of this machine, he too must be constantly alert for a jam or a choking up of this screen. In other words, very often large pieces of material will embed themselves in the openings of the screen. . . . In the operation of this machine, the overloading of this machine could literally destroy it. It knocks the machines out of balance. This is a sensitive machine. It is delicately balanced. Overloading will cause destruction of the machine. . . . [The shaker] has, as an aid to this operation, a long-handled hook. Now, when the odd-shaped pieces of iron will lodge themselves in

one of the openings of the shaker, he had a long-handled hook to dislodge this."

When questioned as to whether laborers could perform the work of a shaker, Green replied:

> "No, I am afraid that I can't accept that because we have on many occasions tried laborers on this job and we found that they do not have the necessary skill to keep the machine clear."

However, Green's description of these duties in the original unfair labor practice proceeding runs as follows:

> "His job [the shaker's] is to do nothing more than push a button and start the shaker, and then survey it and watch and see that no pieces lodge in the opening of the shaker screen, and if such pieces did lodge, his job would be to kind of kick them loose with a little hook he carries in his hand."

Yet, Lopez is the man who Green conceded had received a substantially lower bonus in 1959 and 1960 than the discriminatees as "punishment," and who nevertheless was retained in preference to discriminatee George Collier who was a capable shaker operator, as well as a "superior" truck expeditor, and an average kiln feed conveyor operator, laborer, and car loader, and in preference to discriminatee Samuel Rutherford, who had been employed as a shaker operator, car loader, spoil gate operator, scrap burner and shearman, and who also operated the hi-lift and dozer.[24]

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[24] It is notable that Respondent's chart does not qualify Rutherford as a shaker, or spoil gate operator, and merely accords him as "average" score as a car loader. Nevertheless, Superintendent Pasquarelli candidly admitted that Rutherford was "very good" at these jobs, and there is no record notation that Rutherford's work attendance was anything but good.

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Moreover, I find it implausible that all 13 discriminatees would have been selected for layoff on May 12, 1960. Jack Buncher, Respondent's sole proprietor, testified in the original unfair labor practice proceeding that there was nothing seriously wrong with the work of the discriminatees prior to their discrimination, that he never had any serious complaints concerning their work, and that he would rehire them if needed. This sentiment was reiterated in the instant proceeding. Moreover, Buncher declared in the original proceeding that Henry Ivy would not have terminated on January 16, 1960, had Buncher been forewarned of Ivy's selection for separation on that date. This testimony is hardly supportive of Respondent's unswerving assertion that none of the discriminatees would have been retained on and after May 12, 1960.[25]

In sum, Respondent would lead me to believe that the Cindricks and Greene, who had extended and uninterrupted service with Respondent; who were concededly excellent heavy equipment operators; who were retained in a prior reduction in force in preference to employees who were kept in Respondent's employ after the critical date of May 12, 1960; who received larger bonuses and wages than their counterparts prior to their discrimination; and, who, in most cases, had greater seniority than those retained, would nevertheless not have remained on its payroll after the critical date because of their failure to satisfy Respondent's criteria for retention or recapture of employment. I find it not only implausible but incredible that Gerald Hinger, or Clarence Ardrey, both of whom displayed an

[25] Despite Respondent's contention to the contrary, none of the employees employed at Nine Mile Run on May 12, 1960 were laid off. Rather, four such employees were simply transferred to other facilities on that date.

admitted lack of proficiency in the jobs in which the Cindricks and Green concededly excelled, would have debarred the latter from employment during the back-pay period.

Respondent would also have me believe that George Collier would not have been employed after May 12, 1960, either as a truck expeditor, a car loader, or shaker or kiln feed conveyor operator at Nine Mile, despite the fact that Collier's replacements, John Edditor and Gambino Lopez, were proven to be inadequate because of lack of ability or poor attitude following that date.[26] Moreover, it strains credulity to believe, as Respondent urges, that discriminatee Ivy would have had no job in Respondent's industrial structure after May 12, 1960, in view of Buncher's insistence that Ivy would not have been terminated on January 16, 1960, had the former been apprised of the impending discharge, and in light of the fact that Ivy had greater seniority than his replacement, Aaron Scott, and had been favored with substantially larger bonuses than Scott prior to Ivy's discharge.

After a careful consideration of the entire record made in this and the original proceeding, I am convinced that Respondent's failure to retain or recall the discriminatees during the pertinent backpay periods was occasioned, not by their inability to satisfy Respondent's employment criteria, but by a continued manifestation of Respondent's discriminatory attitude toward these individuals. I am

[26] Respondent's assertion that comparative wage rates were a determinant in retaining or recalling employees, and thereby foreclosed employment to some or all of the discriminatees during the backpay period, is belied by its action in transferring Willie Harris, allegedly a multi-skilled employee, from Jeffdale to Nine Mile to perform the simplified duties of truck expeditor. Harris' wage rate is listed on Respondent's chart as $1.95 per hour, while Collier's rate is $1.65.

fortified in this conclusion by Respondent's flagrant disregard of the Board's original Order, as enforced by the United States Court of Appeals. That mandate directed Respondent, in order to purge itself of its unfair labor practices, to offer to the discriminatees

> "immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, dismissing, if necessary, all employees since hired. If there is not then sufficient work available for the remaining employees and those to be offered reinstatement, all available positions shall be distributed among them without discrimination against any employee because of concerted activities, in accordance with the system of seniority, or other nondiscriminatory practice heretofore applied by Respondent in the conduct of its business. The Respondent shall place those employees, if any, for whom no employment is available after such discrimination on a *preferential list*, with priority in accordance with such system of seniority or other nondiscriminatory practice heretofore applied by the Respondent in the conduct of his business, and thereafter offer *them reinstatement as such employment becomes available and before other persons are hired.*" (Emphasis supplied)[27]

So far as this record stands, the Respondent not only failed to consider the discriminatees for reemployment until approximately 2 years following their discriminatory discharges; and approximately 15 months subsequent to

[27] *Jack G. Buncher, d/b/a The Buncher Company*, 131 NLRB 1444, as clarified by the Board's Order of September 22, 1961.

the initial Trial Examiner's Decision, a consideration which was judicially imposed upon it,[28] but indeed flouted its legal obligations by hiring new employees or rehiring former employees for work which the discriminatees could have performed, and undertook to train workers without affording such training to the discriminatees who were all classified on Respondent's chart as possessing above average or superior ability to learn new tasks. Thus, during the summer months of 1960 and 1961, Respondent provided employment as laborers to Jay Cohen, Arthur and Myron Rubinoff, and Thomas Johnson, although discriminatees Jackson and Roth had labored for Respondent for years, and Ivy, West, Loughner, and Wytiaz were not only "average" to "superior" laborers but could also perform other jobs as well.[29] Moreover, Respondent admittedly trained employees, such as James Russell, to perform work tasks which, but for their discrimination, the discriminatees could have undergone.

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[28] See *Underwood Machinery Corporation*, 95 NLRB 1386, 1392, enf'd 179 F. 2d 118 (C. A. 1): ". . . if . . . the instant case presents a situation in which, at most, there was a *reduction* in the amount of available work for men in Donnelly's former position or substantially equivalent positions, the release of the Respondent from its obligations to reinstate and indemnify Donnelly under the Board's order and the Court's decree, depends upon a showing by the Respondent that it actually considered him for the remaining work of this type, but that, for nondiscriminatory reasons, decided not to reinstate him but to use other employees instead. Only thus could the Respondent show, as the Board's order and the Court's decree required, that even if Donnelly had continued in Respondent's employ, he would not have been retained for work but would have been laid off."

[29] The fact that Cohen and the Rubinoffs were relatives of Jack Buncher and were employed solely to enhance their financial ability to complete their college education is of no avail to Respondent. Inasmuch as the issue here involved concerns the availability of work for the discriminatees during the backpay periods, familial paternity is irrelevant. See *Charley Toppino and Sons, Inc.*, 151 NLRB No. 153, TXD at p. 12, footnote 34, enf'd ——— F. 2d ——— (C. A. 1), 61 LRRM 2655.

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Accordingly, upon a consideration of the foregoing facts and the entire record, I find and conclude that the Respondent has failed to sustain the burden of its affirmative defense that the discriminatees would not have retained on, or recalled after, May 12, 1960, at Respondent's various installations during the respective backpay periods, because they did not satisfy Respondent's criteria for the retention of or recall to employment in the same degree and in the same manner as incumbent employees or those who were recalled or newly hired. I therefore find and conclude that the General Counsel's *prima facie* case, as contained in the Backpay Specification and amplified by the testimony of Elmer Hope, compliance officer, has not been overcome by Respondent. I shall therefore make appropriate recommendations concerning the discharge of Respondent's monetary indebtedness to the discriminatees.

II. Recommendations

I have heretofore found and concluded that, but for Respondent's illegal discrimination, the discriminatees (with the exception of Milton Ashford) would have continued to be employed by Respondent during the periods and at the locations set forth in the Backpay Specification after the economic reduction in force which occurred at Nine Mile on May 12, 1960. Accordingly, I approve and adopt the computations contained in the Specification, as amended at the hearing, with respect to Respondent's backpay liability to each discriminatee on and after that date. Inasmuch as I have previously found in the initial Supplemental

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Decision that the discriminatees were entitled to specified amounts of backpay from the dates of their discrimination to May 12, 1960, which amounts parallel those contained in the Specification for that period, I shall recommend that the consolidated amounts as set forth in the Specification be paid to them.

I have also heretofore concluded and found that Ivy, Rutherford, Loughner, and Wytiaz were rehired by Respondent on January 12, 1962 for work at Leetsdale, although work was available for these individuals at Nine Mile where they had previously been employed. The Backpay Specification treats the earnings of these individuals at Leetsdale for the period from January 12, 1962 to March 26, 1964 as interim earnings, and I approve and adopt such treatment. The specification utilizes the March 26, 1964 date because Respondent's payroll and related records for subsequent periods were unavailable. As I am unable to ascertain on this record whether these discriminatees would have been eligible for employment at Nine Mile after March 26, 1964, or the amount of additional backpay, if any, to which they might be entitled after that date, I shall refer the matter for further compliance proceedings.

Summarizing the calculations made in the Backpay Specification which I approve and adopt, I recommend that Respondent's obligation to make whole the discriminatees shall be satisfied by payment to them of the respective sums set forth below, together with interest thereon at the rate of 6 percent per annum, calculated in the manner set forth in Local 138, International Union of Operating

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Engineers, AFL-CIO, et al., 151 NLRB No. 102, less any lawfully required tax withholding.

James Cindrick	$7,683.04
John H. Cindrick	8,253.16
William Greene	6,019.88
George Collier	8,415.35
Robert Vinsick	3,802.51
John West	3,887.55
Archie Jackson	6,369.32
James Roth	$ 1,457.56
Milton Ashford	1,361.30
Henry Ivy	14,335.25
Ronald Loughner	14,438.49
Sammie Rutherford	11,142.33
Joseph Wytiaz	12,070.58

I recommend that the Board adopt the foregoing Findings, Conclusions, and Recommendations.

Dated at Washington, D. C., May 23, 1966.

MAX ROSENBERG,
Trial Examiner.

APPENDIX G

Order of the National Labor Relations Board Remanding Proceeding to Trial Examiner, January 13, 1966

ORDER REMANDING PROCEEDING TO TRIAL EXAMINER

On August 6, 1965, Trial Examiner Max Rosenberg issued his Supplemental Decision in the above-entitled proceeding, and on the same date the proceeding was transferred to the Board. The Trial Examiner concluded, *inter alia*, that the General Counsel's reliance upon seniority in his Backpay Specification was unreasonable and arbitrary, in view of a finding by the Board that the Court of Appeals in the original unfair labor practice proceeding that the Respondent did not utilize seniority in curtailing or enlarging its work force in the course of its business operations. He therefore recommended that the Backpay Specification be dismissed insofar as it relates to periods after May 12, 1960, because it utilizes seniority in determining the backpay due. Thereafter, the General Counsel, Respondent and the Charging Party filed exceptions to the Trial Examiner's Supplemental Decision, and briefs in support thereof.

The General Counsel contends, *inter alia*, that the Trial Examiner erred in finding unreasonable and arbitrary that portion of the Backpay Specification which utilizes seniority to support the backpay periods and computations subsequent to May 12, 1960. Conceding, *arguendo*, that the original Trial Examiner, the Board, and the Court found that the Respondent did not maintain such a seniority system, the General Counsel contends that such a finding does not preclude the use of seniority or length

Order of the National Labor Relations Board Remanding Proceeding to Trial Examiner, January 13, 1966.

of service for the remedial effectuation of the Board Order and the Court Decree in this case if no other reasonable method can be employed.

The Board has duly considered the matter and concludes that an absence of the use of seniority by the Respondent does not render the General Counsel's utilization of seniority in this proceeding arbitrary or unreasonable, *per se*. The Trial Examiner's findings and conclusions with respect to that portion of the Backpay Specification relating to periods subsequent to May 12, 1960, are hereby reversed, and the case will be remanded to the Trial Examiner for the submission of a Second Supplemental Decision. Said Decision shall set forth the findings, conclusions, and recommendations with regard to the backpay, if any, to which the discriminatees are entitled for the period or periods subsequent to May 12, 1960.

IT IS HEREBY ORDERED that the above-entitled proceeding be, and it hereby is, remanded to Trial Examiner Max Rosenberg for the preparation and issuance of a Second Supplemental Decision setting forth findings, conclusions, and recommendations with regard to backpay, if any, to which the discriminatees are entitled for the period or periods subsequent to May 12, 1960. Copies of such Supplemental Decision shall be served upon all parties after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D. C., January 13, 1966.

By direction of the Board:

GEORGE A. LEET,
Associate Executive Secretary.

APPENDIX H

Trial Examiner's Supplemental Decision, August 6, 1965

TRIAL EXAMINER'S SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

This supplemental proceeding was instituted by the Regional Director for the Sixth Region for the purpose of determining the amount of backpay, if any, due to certain employees whom the National Labor Relations Board had found in an earlier case to have been discriminatorily laid off by Respondent in violation of Section 8(a)(3) and (1) of the Act. As hereinafter set forth, the order of the Board, directing the Respondent to make the employees whole for any loss of pay they may have sustained as a result of the discrimination practiced against them, was enforced by the United States Court of Appeals for the Third Circuit. Pursuant to appropriate notice, a hearing was held before me in Pittsburgh, Pennsylvania, on various dates between December 16, 1964, and January 7, 1965, upon the limited issues raised by the pleadings. All parties were represented by counsel and were afforded full opportunity to examine and cross-examine witnesses and to introduce pertinent evidence. At the conclusion of the hearing, the parties waived oral argument. Excellent briefs have been filed by the General Counsel and the Respondent, which have been duly considered.

Upon the entire record made in this proceeding,[1] I hereby make the following:

[1] I have taken official notice of the record in the original unfair labor practice proceeding.

Trial Examiner's Supplemental Decision, August 6, 1965.

FINDINGS

I. *Background*

On September 20, 1960, Trial Examiner George J. Bott issued his decision in the unfair labor practice proceeding herein, finding, *inter alia* that the Respondent had violated Section 8(a)(3) and (1) of the Act by laying off 13 employees between January 15, 1960 and March 4, 1960, at its Nine Mile Run facility in Pittsburgh, Pennsylvania, because they had joined or assisted the Charging Union. Although the Trial Examiner acknowledged that there existed at the time of these layoffs economic justification for a reduction in force under normal business practices, he nevertheless concluded that "The decision to make a staff reduction at the time, therefore, despite the economic factors which have justified it, was not only triggered by the advent of the Union, but the selection of the employees to be laid off or transferred was also motivated by anti-union considerations in substantial part." In considering the reasons advanced by Respondent for selecting the discriminatees for layoff, the Trial Examiner accepted Respondent's testimonial assertion that it had never maintained an agreement, policy, practice or system pursuant to which seniority was exclusively or primarily utilized in determining whether employees were to be laid off, recalled, or rehired, and made a specific finding in this respect. On June 30, 1961, the Board issued a Decision and Order in which it adopted the foregoing findings of the Trial Examiner.[2] In fashioning a remedy for these unfair labor practices the Board stated:

[2] *Jack G. Buncher, d/b/a The Buncher Company*, 131 NLRB 1444, as clarified by the Board's order of September 22, 1961.

It appears that following the layoffs occurring on January 15, 1960, through March 4, 1960, which have been found herein to have been discriminatory, the Respondent's business operations were more efficient and the workload could be accomplished with a reduced work force. It is therefore possible that some of the employees discriminated against on January 15 through March 4, 1960, might have been laid off in a subsequent reduction in force even absent the Respondent's unfair labor practices. Under these circumstances, we shall order the Respondent to offer those employees listed on Appendix A, attached hereto (the thirteen discriminatees), immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority and other rights and privileges, dismissing, if necessary, all employees since hired. If there is not then sufficient work available for the remaining employees and those to be offered reinstatement, all available positions shall be distributed among them without discrimination against any employee because of concerted activities, in accordance with the system of seniority or other nondiscriminatory practice heretofore applied by the Respondent in the conduct of his business. The Respondent shall place those employees, if any, for whom no employment is available after such distribution on a preferential list, with priority in accordance with such system of seniority or other nondiscriminatory practice heretofore applied by the Respondent in the conduct of his business, and thereafter offer them reinstatement as such employment becomes available and before other persons are hired for such work.

In considering the issue of backpay, the Board noted:

> As some of the employees discriminated against on January 15 through March 4, 1960, might have been laid off in a subsequent reduction in force, even absent unfair labor practices, such possible termination of employment shall be taken into consideration in computing the backpay due these employees under the terms of this Order.

In a *per curiam* opinion filed on May 20, 1963, the United States Court of Appeals for the Third Circuit enforced in full the Board's order, including the provision for backpay.[3]

II. *The Pleadings*

The present proceeding was instituted on August 31, 1964, when the Regional Director for the Sixth Region issued his Backpay Specification, as amended at the hearing. Because of the various pretrial motions which were made, and my rulings thereon, it might help to illuminate the issues as they were ultimately refined by setting forth the pertinent allegations in the Backpay Specification. In paragraph 1 thereof, the Regional Director set forth the alleged backpay periods for the discriminatees.[4] Para-

[3] *N. L. R. B. v. Jack G. Buncher, d/b/a The Buncher Company*, 316 F. 2d 928. The Court's decree is dated June 14, 1963.

[4] The discriminatees and the dates on which their discrimination occurred are as follows:

John A. Cindrick, 1-16-60
James H. Roth, 1-16-60
Milton Ashford, 1-16-60
Henry Ivy, 1-16-60
Joseph Wytiaz, 1-16-60
George Collier, 1-19-60
Robert Vinsick, 1-20-60
Ronald Loughner, 1-20-60
Samuel Rutherford, 1-30-60
Archie Jackson, 2-13-60
John West, 2-13-60
William Greene, 2-20-60
James Cindrick, 3-5-60

graph 2 alleged in substance that, absent unfair labor practices, the first reduction in force at Respondent's Nine Mile Run facility (where the discriminatees had been employed) would have occurred and did occur on May 12, 1960. Paragraph 3 averred that the discriminatees were entitled to backpay in accordance with the weekly average hours worked by employees at that facility until May 12, 1960. In Paragraph 4, the Regional Director set forth his bases for determining each discriminatee's entitlement to backpay after May 12, 1960, by allocating work at the Nine Mile Run facility if available, or if none was available, by allocating work at Respondent's other installations at Leetsdale and the Yard, among the discriminatees and the other employees "in accordance with their seniority," which, in Paragraph 5, is based on an employee's most recent hiring date with Respondent. Paragraph 6 of the Specification alleged that each discriminatee was entitled to backpay at each of the respective installations computed on the basis of the weekly average hours worked by employees at these installations after May 12, 1960, and Paragraph 7 set forth in Appendices to the Specification the weekly average hours throughout the pertinent backpay period. Paragraphs 8 and 9 alleged that general wage increases and a bonus were given to employees in December of each year in the backpay period which were due and owing to the discriminatees. The remaining Paragraphs of the Specification described the mechanics for the computation of net backpay due the discriminatees and specifically treated with the alleged backpay entitlement of each.

Following issuance of the Backpay Specification, the Respondent filed its Answer on October 14, 1964. For the

most part, the Answer sought to relitigate issues concerning the economic justification for the severance of the discriminatees which had already been determined in the prior unfair labor practice proceeding. However, in answer to Paragrapth 4 of the Backpay Specification, Respondent denied that seniority, as therein alleged, would have been the criterion for selecting employees for retention or recall and asserted that other, nondiscriminatory reasons, would have disentitled the discriminatees to employment by Respondent on and after May 12, 1960. On October 19, 1964, the General Counsel filed a Motion for Strike Portions of Respondent's Answer and Motion for Judgment on the Pleadings, which Motions were referred to the undersigned Trial Examiner for ruling. By order dated October 23, 1964, I denied the General Counsel's Motion to Strike paragraph 7 of the Answer inasmuch as it placed in issue the number of employees on Respondent's weekly payroll during the pertinent backpay period and hence controverted the General Counsel's backpay computations.[5] Concurrently, I issued an order upon Respondent to show cause why the Motion to Strike should not be granted as to such other paragraphs in its Answer wherein it denied that it ever maintained or utilized a system of seniority pursuant to which employees were selected for retention or layoff, and which averred that the discriminatees were not retained in Respondent's employ after

[5] Paragraph 7 of Respondent's Answer was directed toward the parallel advocative paragraph in the General Counsel's Specification. The Answer controverted, in certain respects, the number of employees who were employed during the various weeks of the backpay period and thus put in issue the average weekly hours worked by Respondent's employees during that period, as set forth in Appendices A and B of the Backpay Specification. At the hearing, and again in its brief, the Respondent conceded the accuracy of the computations set out in those Appendices and this matter was removed as an issue in the case.

May 12, 1960, because they failed to satisfy Respondent's criteria for retention of employment which were unrelated to seniority. In that order, I directed the Respondent to set forth in its response the precise criteria utilized by Respondent to determine whether to lay off, retain, or rehire employees, and, further, to set forth the names of the employees retained on and after May 12, 1960, or subsequently employed or recalled on and after that date, in preference to the discriminatees, together with their job classifications and/or work assignments; the manner and degree in which said employees satisfied the criteria utilized by Respondent; and, the manner and degree in which the discriminatees failed to satisfy those criteria as contrasted with each and every employee who was retained, employed, or recalled since May 12, 1960, in preference to the named discriminatees. I further granted the General Counsel's Motion to Strike all averments in Respondent's Answer, except those which were specifically saved in my order, on the ground that those averments sought to relitigate matters laid to rest in the unfair labor practice proceeding[6] and/or failed to satisfy the requirements of specificity set forth in Section 102.54(b) of the Board's Rules and Regulations.[7] Finally, I denied the General Counsel's Motion for Judgment on the Pleadings.

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[6] See *N. L. R. B. v. Biscayne Television Corporation*, 337 F. 2d 267, 268 (C. A. 5).

[7] Section 102.54(b) prescribes the contents of an answer to a backpay specification and provides, in pertinent part: "As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross pay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures."

Trial Examiner's Supplemental Decision, August 6, 1965.

On November 30, 1964, the Respondent filed its response to the order to show cause in which it set forth the criteria which it asserted were utilized in selecting employees for layoff, retention, or recall, on and after May 12, 1960, together with a chart purporting to show the manner in which each employee, including the discriminatees, did or did not satisfy Respondent's criteria. Thereafter, the General Counsel moved to strike the response on various grounds, which motion I denied.

III. *The issues*

On the basis of the pleadings, as well as my rulings on the various motions filed, the issues which remained outstanding as the hearing got under way related to (1) whether it was legally permissible for the General Counsel to utilize seniority alone to support his contention that the discriminatees would have worked for Respondent after May 12, 1960, in preference to other employees, and were entitled to backpay in the amounts and for the periods outlined in his Specification, and, if so, (2) whether the Respondent had used nondiscriminatory criteria, other than seniority, in selecting employees for layoff, recall, or employment after that date which, when applied to the discriminatees, disqualified them for employment and hence disentitled them to backpay for any period following May 12. However, at the hearing, Respondent moved to amend its Answer to aver that all of the discriminatees would have been laid off for economic reasons on March 10, 1960,

rather than May 12, 1960.[8] This latter issue was again pressed in Respondent's brief and will be disposed on hereinafter[9].

At the hearing, the Respondent moved to dismiss the Backpay Specification on the ground that, as a pleading, it was legally defective because the backpay periods and the computations contained therein rested solely on the premise that Respondent utilized seniority in determining who should be retained, laid off, or rehired, after May 12, 1960. In support of this assertion, the Respondent pointed out that the Trial Examiner in the original unfair labor practice proceeding had found as a fact, and the Board and the United States Court of Appeals for the Third Circuit affirmed the finding, that the Respondent did not use seniority either solely or primarily in enlarging or curtailing its work force in the course of its business operations. In essence, the Respondent argued that it was improper for the General Counsel to select seniority as the formula for computing backpay because this criterion,

[8] Respondent also urged, by motion at the hearing to amend its Answer that it did not grant general wage increases to all employees in December of each year of the backpay period and hence all of the discriminatees would not have been entitled to such increases for the various reasons which it advanced. Prior to the hearing, I granted the General Counsel's Motion to Strike Respondent's Answer in which the discriminatees entitlement to these increases was denied, on the ground that the Answer failed to satisfy the requirements of specificity outlined in Section 102.54(b) of the Board's Rules and Regulations. I adhere to my previous ruling and deny Respondent's motion to amend. In any event, I have hereinafter found that Respondent's backpay liability to the discriminatees terminated on May 12, 1960, prior to the date on which the first wage increase (December 1960) was granted. This issue, placed in this posture, is accordingly mooted.

[9] The Respondent takes no issue with, and concedes the accuracy of, the following matters as they appear in the Backpay Specification:

(a) The calculation of average hours, *i.e.*, the use of average hours and the use of numbers of employees to determine average hours worked during the backpay period; (b) the payment of bonuses and the entitlement of the discriminatees to such bonuses if any backpay is deemed due at all to them; and, (c) the discriminatees' interim earnings and diligence of their search for employment during the backpay period.

was neither reasonable nor appropriate in light of the antecedent finding of fact that seniority was not utilized by Respondent to effect a reduction in staff. In opposition to the motion to dismiss, the General Counsel contended that, despite the foregoing findings of fact concerning the absence of an established seniority system, seniority was nevertheless a reasonable and objective criterion upon which to predicate the backpay claims. Because of the apparent novelty of the question posed, I reserved ruling on the motion and put the Respondent to its proof as to the criteria which it employed in separating the discriminatees. After long and thoughtful study of this issue, I am persuaded that the Backpay Specification should be dismissed insofar as it utilizes seniority to support the backpay periods and computations after May 12, 1960.

I am not unmindful, as the United States Court of Appeals for the Eighth Circuit observed in *N. L. R. B. v. Brown & Root, Inc.*,[10] that "In solving the problems which arise in backpay cases the Board is vested with a wide discretion in devising procedures and methods which will effectuate the purposes of the Act." I am also aware that this Court noted that "in many cases it is difficult for the Board to determine precisely the amount of backpay which should be awarded to an employee. In such circumstances the Board may use as close approximations as possible, and may adopt formulas reasonably designed to produce such approximations."[11] However, that tribunal expressed the caution that the method of backpay computations which the Board selects must not be "arbitrary or unreasonable

[10] 311 F. 2d 447, 452. And see *Phelps Dodge Corp. v. N. L. R. B.*, 313 U. S. 177, 199.

[11] *N. L. R. B. v. Brown & Root, Inc., supra* at p. 452.

in the circumstances involved,"[12] and that the computations must be made "upon any range of facts, circumstances or reasonable inferences, which afford a rational basis for a conclusion."[13]

In view of the Board's decision and the Court's enforcement decree, both of which adopted Trial Examiner Bott's finding that Respondent did not maintain an established seniority system for reducing its work complement,[14] it seems to me that this finding became the law of the case on remand which the undersigned Trial Examiner, as well as the General Counsel, must accept as datum. If I am correct in this judgment, I fail to perceive how the General Counsel can urge that his selection of seniority as the predicate for his Backpay Specification was a reasonable one which afforded "a rational basis for a conclusion" inasmuch as that matter had already been decided adversely to him in the prior Board and Court proceedings.[15] It would seem only fair and just that, if Respondents in backpay proceedings may not relitigate issues which have been laid at rest in unfair labor practice proceedings,[16] neither may the General Counsel.[17]

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[12] *N. L. R. B. v. Ozark Hardware Company*, 282 F. 2d 1, 7.

[13] *N. L. R. B. v. Kartarik, Inc.*, 227 F. 2d 190, 193.

[14] In its brief, the General Counsel seemingly concedes that the Board, in its original decision, found that Respondent did not have such a seniority system.

[15] *Cf. Peerless Distributing Company*, 149 NLRB No. 96.

[16] *Cf. N. L. R. B. v. Biscayne Television Corporation*, 337 F. 2d 267, 268 (C. A. 5).

[17] The General Counsel introduced into evidence General Counsel's Exhibit No. 3 in an attempt to demonstrate that, during a reduction in force in 1957, Respondent "basically" utilized seniority in affecting the reduction at the Nine Mile Run location. This attempt proved abortive. The Exhibit shows that 34 employees were employed on the date of the layoff, and 16 of them were separated. Nine of these employees, including a discriminatee, were laid off out of context with their seniority.

Moreover, I am not persuaded either by the case precedent or the other circumstances advanced by the General Counsel that a contrary conclusion is dictated. I recognize that both the Board and the Courts in *Ozark Hardware* and *Kartarik* have approved the use of seniority as a reasonable basis for the computation of backpay where there was no demonstrated, established system of seniority at an employer's plant, because "on the basis of normal industrial practice generally," the employer might in reasonable probability have made layoffs in relation to an employee's length of service. But where it has been determined that utilization of seniority was *not* the "normal" business practice, as in the instant case, I am hard-pressed to understand how this determination fits into those decisional molds. Nor do I deem it significant that the Board, in its remedy, referred to seniority when it directed that jobs be allocated at Respondent's installations "in accordance with the system of seniority or other nondiscriminatory practice heretofore applied by Respondent in the conduct of his business." Although the General Counsel argues that the Board thereby acknowledged that Respondent utilized seniority in dealing with its employees' employment relationship, I am not convinced that the Board intentionally indulged in the inconsistency of finding in the substantive aspect of the case that seniority was not used in effecting reductions in force, while finding in its remedial section just the opposite.

In view of the foregoing findings, I deem it unnecessary to consider whether the Respondent's asserted reasons for its failure to retain, transfer, or recall the discriminatees on and after May 12, 1960, possess or lack validity. In the posture of this case, nothing would be gained by such con-

sideration unless I were to decide that, even though the General Counsel has chosen an unreasonable or arbitrary basis to support his backpay computations, or no basis at all, the Respondent must nevertheless come forward and meet a phantom. If this is the state of Board law in this area, as the General Counsel seemingly suggests, I believe it should be set forth with a greater degree of clarity than now exists. Accordingly, I shall recommend that the Backpay Specification be dismissed insofar as it relies exclusively upon seniority to support the backpay periods and computations on and after May 12, 1960.

I turn next to Respondent's assertion that the cut-off date for backpay should be March 10, 1960, rather than May 12 of that year. Paragraph 2 of the Specification alleged that, on the latter date, the first economic reduction in force following the discriminatory severance of the thirteen employees would have, and did, occur. Respondent's answer to this allegation was as follows:

> 2. The averment of Paragraph Two of the Specification *is admitted;* by way of further Answer it is averred that the employer's reduction in force subsequent to March 4, 1960, other than prior reductions as alleged in certain preceding paragraphs, was in direct response to the cut-back in orders from the [Jones & Laughlin] Steel Company as referred to at Paragraph 1(d) above." (Emphasis supplied.)

Paragraph 1(d) of the Answer avers that this curtailment of orders first occurred on May 12, 1960. The "certain preceding paragraphs" referred to in the Answer sought to justify the denial of backpay on the ground that economic considerations would have warranted the layoff of

the discriminatees on the dates of their discrimination. With respect to those "certain preceding paragraphs," namely, paragraphs 1(a) and (b), I granted the General Counsel's motion to strike those averments on the ground that Respondent was thereby attempting to relitigate issues which had already been adjudicated in the unfair labor practice proceeding.[18] As thus shown, Respondent's Answer to Paragraph 2 of the Specification contained an admission that the first reduction in staff at the Nine Mile Run installation occurred on May 12, 1960.

At the hearing, the Respondent moved to amend or clarify its Answer to assert that the discriminatees would have been laid off due to lack of work on March 10, 1960, although it again admitted that the first reduction in force would have taken place on May 12, 1960. In support of this motion, Respondent contended that the original paragraph 1 (b) of its Answer properly put this assertion in issue. That Paragraph recites

> (b) That not later than March 4, 1960, the date John Cindrick, last of the discriminatees, was laid off, and prior thereto but subsequent to January 15, 1960, the employer had economic reason and justification for reducing the work force at the Nine Mile Run facility as further evidenced by the finding of the Trial Examiner and as adopted by the Board, referred to above at Paragraph 1(a) of the Answer; March 4, 1960, or prior thereto but subsequent to January 15, 1960, should thus be determined as the cut-off date of the employer's back pay liability; in the alternative.

[18] I also struck Paragraph 1(c) of Respondent's Answer which averred that backpay should be abated on and after March 18, 1960, because Respondent "accepted the offer of settlement" of the backpay proceeding "advanced" by the Regional Director for the Sixth Region on that date. The Respondent did not challenge this ruling either at the hearing or in its brief herein.

It takes no more than a casual reading of this Paragraph to convince even the kindest antagonist of semantics that this defensive pleading does nothing more than reecho a refrain which has already been found by the Board to be statutorily discordant. I denied Respondent's motion for the reasons set forth in my ruling on the General Counsel's original motion to strike this portion of Respondent's Answer. I perceive no reason for departing from that ruling now. Accordingly, I find that the 13 discriminatees are entitled to backpay pay from the dates of their discrimination to May 12, 1960.

CONCLUSIONS

I have heretofore found that the discriminatees are entitled to backpay from the dates of their discrimination to May 12, 1960. I approve and adopt the computations contained in the Specification relating to the first quarter of 1960, and ending on March 31 of that year, with respect to each discriminatee. Because I have altered the backpay cutoff date, I shall correct the computations for the second quarter of 1960 to reflect the correct amounts which I find to be due to the individual discriminatees until May 12, 1960. In doing so, I have utilized the "Adjusted Average Hours" contained in Appendix A of the Backpay Specification, the accuracy of which Respondent concedes, for the pay weeks of April 7, 1960, through May 12, 1960. Thus calculated; each discriminatee would have worked 389.8 hours during the second quarter of 1960, and would have received wages at the rate listed in the Specification. Net interim earnings for the second calendar quarter, where applicable, have been adjusted at 6/13ths, or 46 percent, of the earnings for that quarter to accommodate

the May 12, 1960, cutoff date. The corrected gross and net backpay for the pertinent calendar quarters for each discriminatee is as follows:

James Cindrick

Calendar Quarter	Hours & Rate of Pay	Gross Backpay	Net Interim Earnings	Net Backpay
1960-1 (Beginning 3/5)	259.6 @ $2.10	$ 545.16	None	$ 545.16
1960-2 (Ending 5/12)	389.8 @ $2.10	818.58	None	818.58
				$1363.74

John A. Cindrick

Calendar Quarter	Hours & Rate of Pay	Gross Backpay	Net Interim Earnings	Net Backpay
1960-1 (Beginning 1/16)	691.7 @ $2.15	$1487.15	None	$1487.15
1960-2 (Ending 5/12)	389.8 @ $2.15	830.07	$156.76[19]	681.31
				$2168.46

[19] John A. Cindrick's net interim earnings as originally set forth in the Specification were $337.85. By the General Counsel's amendment at the hearing, this figure was escalated to $340.79. The adjusted interim earnings represent 6/13ths, or 46 percent of the latter figure.

William Greene

Calendar Quarter	Hours & Rate of Pay	Gross Backpay	Net Interim Earnings	Net Backpay
1960-1 (Beginning 2/20)	393.0 @ $2.25	$ 884.25	None	$ 884.25
1960-2 (Ending 5/12)	389.8 @ $2.25	877.05	$225.88[20]	651.17
				$1535.42

George Collier

Calendar Quarter	Hours & Rate of Pay	Gross Backpay	Net Interim Earnings	Net Backpay
1960-1 (Beginning 1/19)	682.7 @ $1.65	$1126.45	None	$1126.45
1960-2 (Ending 5/12)	389.8 @ $1.65	643.17	None	643.17
				$1769.62

[20] William Greene's net interim earnings as originally set forth in the Specification were $48[illegible]10. By amendment at the hearing, this figure was changed by the General Counsel to $491.04. The adjusted interim earnings represent 6/13ths or 46 percent of the latter figure.

Henry Ivy

Calendar Quarter	Hours & Rate of Pay	Gross Backpay	Net Interim Earnings	Net Backpay
1960-1 (Beginning 1/16)	427.7 @ $1.85	$ 791.24	None	$ 791.24
1960-2 (Ending 5/12)	389.8 @ $1.85	721.13	$36.80[21]	684.33
				$1475.57

Ronald Loughner

Calendar Quarter	Hours & Rate of Pay	Gross Backpay	Net Interim Earnings	Net Backpay
1960-1 (Beginning 1/20)	673.7 @ $1.75	$1178.97	None	$1178.97
1960-2 (Ending 5/12)	389.8 @ $1.75	582.15	$65.03[22]	517.12
				$1696.09

[21] As adjusted at the rate of 6/13ths or 46 percent of the original sum of $80.

[22] As adjusted at the rate of 6/13ths or 46 percent of the original sum of $141.36.

Sammie Rutherford

Calendar Quarter	Hours & Rate of Pay	Gross Backpay	Net Interim Earnings	Net Backpay
1960-1 (Beginning 1/30)	581.5 @ $1.60	$ 930.40	None	$ 930.40
1960-2 (Ending 5/12)	389.8 @ $1.60	623.68	$245.19[23]	378.49
				$1308.89

Robert Vinsick

Calendar Quarter	Hours & Rate of Pay	Gross Backpay	Net Interim Earnings	Net Backpay
1960-1 (Beginning 1/20)	679.0 @ $1.75	$1188.25	$159.00	$1029.25
1960-2 (Ending 5/12)	389.8 @ $1.75	582.15	573.62[24]	8.53
				$1037.78

[23] As adjusted at the rate of 6/13ths or 46 percent of the original sum of $533.03.

[24] As adjusted at the rate of 6/13ths or 46 percent of the original sum of $1247.

Joseph Wytiaz

Calendar Quarter	Hours & Rate of Pay	Gross Backpay	Net Interim Earnings	Net Backpay
1960-1 (Beginning 1/16)	691.7 @ $1.75	$1210.47	None	$1210.47
1960-2 (Ending 5/12)	389.8 @ $1.75	582.15	None	582.15
				$1792.62

John West

Calendar Quarter	Hours & Rate of Pay	Gross Backpay	Net Interim Earnings	Net Backpay
1960-1 (Beginning 2/13)	456.4 @ $1.60	$ 730.24	None	$ 730.24
1960-2 (Ending 5/12)	389.8 @ $1.60	623.68	None	623.68
				$1353.92

Archie Jackson

Calendar Quarter	Hours & Rate of Pay	Gross Backpay	Net Interim Earnings	Net Backpay
1960-1 (Beginning 2/13)	456.4 @ $1.50	$ 684.60	None	$ 684.60
1960-2 (Ending 5/12)	389.8 @ $1.50	584.70	None	584.70
				$1269.30

James Roth

Calendar Quarter	Hours & Rate of Pay	Gross Backpay	Net Interim Earnings	Net Backpay
1960-1 (Beginning 1/16)	691.7 @ $1.40	$ 968.38	$53.00	$ 905.38
1960-2 (Ending 5/12)	389.8 @ $1.40	545.72	64.34	481.38
				$1386.76

Milton Ashford

Calendar Quarter	Hours & Rate of Pay	Gross Backpay	Net Interim Earnings	Net Backpay
1960-1 (Beginning 1/16)	691.7 @ $1.40	$ 968.38	$116.00	$ 852.38
1960-2 (Ending 5/12)	389.8 @ $1.40	545.72	36.80	508.92
				$1361.30

Summarizing the calculations hereinabove made, I conclude and find that Respondent's obligation to make whole the discriminatees shall be satisfied by payment to them of the respective sums set forth below, together with interest thereon at the rate of 6 percent per annum, commencing with the last day of each calendar quarter, measured from the date of this Supplemental Decision.[25]

James Cindrick	$1363.74
John A. Cindrick	2168.46
William Greene	1535.42
George Collier	1769.62
Henry Ivy	1475.57
Ronald Loughner	1696.09
Sammie Rutherford	1308.89
Robert Vinsick	1037.78
Joseph Wytiaz	1792.62
John West	1353.92
Archie Jackson	1269.30
James Roth	1386.76
Milton Ashford	1361.30

I recommended that the Board adopt the foregoing Findings and Conclusions.

Dated at Washington, D. C. Aug. 6, 1965.

MAX ROSENBERG,
Trial Examiner.

[25] By letter dated April 1, 1965, the General Counsel requested that I impose interest on Respondent's net backpay obligation in accordance with the formula set forth in *Isis Plumbing and Heating Company*, 138 NLRB 716, despite the fact that the Board's original order did not provide for the allowance of interest. In support of this request, the General Counsel relies upon the Board's decision in *Local 138, International Union of Operating Engineers, AFL-CIO, et al.*, 151 NLRB No. 102. The Respondent opposes this request. In *Local 138*, the Board announced that, henceforth, interest would be added to net backpay in backpay proceedings even though no provision for its allowance was made in the original unfair labor practice proceeding. That decision is binding upon me and I hereby grant the General Counsel's request.

APPENDIX B

Decision and Order of the National Labor Relations Board and Trial Examiner's Intermediate Report, June 30, 1961, 131 NLRB 1444

Jack G. Buncher, d/b/a The Buncher Company and United Steelworkers of America, AFL-CIO, Petitioner. *Case No. 6-CA-1917. June 30, 1961*

DECISION AND ORDER

On September 20, 1960, Trial Examiner George J. Bott issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that he cease and desist therefrom and take certain affirmative action as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a brief in support thereof.

Pursuant to the provisions of Section 3(b) of the Act, the Board had delegated its powers in connection with this case to a three member panel [Members Rodgers, Leedom, and Fanning].

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations,[1] with certain modifications in the remedy as hereafter set forth.

[1] The Respondent's motion requesting that the Board receive into evidence, as Respondent's Exhibit No. 50, the toll call records of The Bell Telephone Company of Pennsylvania charged to The Buncher Company at its North Side office, is denied as these records were available at the time of the hearing and were not then offered into evidence.

Decision and Order of the National Labor Relations Board and Trial Examiner's Intermediate Report, June 30, 1961, 131 NLRB 1444.

THE REMEDY

Having found that the Respondent has engaged in and is engaging in certain unfair labor practices, we shall order that he cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It appears that following the layoffs occurring on January 15, 1960, through March 4, 1960, which have been found herein to have been discriminatory, the Respondent's business operations were more efficient and the workload could be accomplished with a reduced work force. It is therefore possible that some of the employees discriminated against on January 15 through March 4, 1960, might have been laid off in a subsequent reduction in force even absent the Respondent's unfair labor practices. Under these circumstances, we shall order the Respondent to offer those employees listed on Appendix A, attached hereto, immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority and other rights and privileges, dismissing, if necessary, all employees since then hired. If there is not then sufficient work available for the remaining employees and those to be offered reinstatement, all available positions shall be distributed among them without discrimination against any employee because of concerted activities, in accordance with the system of seniority or other nondiscriminatory practice heretofore applied by the Respondent in the conduct of his business. The Respondent shall place those employees, if any, for whom no employment is available after such distribution on a preferential list, with priority in accordance

with such system of seniority or other nondiscriminatory practice heretofore applied by the Respondent in the conduct of his business, and thereafter offer them reinstatement as such employment becomes available and before other persons are hired for such work.

We shall also order the Respondent to make whole those employees listed in Appendix A against whom he discriminated for any losses they may have suffered because of the Respondent's discrimination, by payment to each of them of a sum of money equal to that which he would have earned as wages from the date of such discrimination to the date of the offer of reinstatement or placement on a preferential list, as the case may be, less his net earnings during said period, the backpay to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289. As some of the employees discriminated against on January 15 through March 4, 1960, might have been laid off in a subsequent reduction in force, even absent unfair labor practices, such possible termination of employment shall be taken into consideration in computing the backpay due these employees under the terms of this Order.

In view of the nature, variety and extent of the unfair labor practices committed, the Respondent shall be ordered to cease and desist from infringing in any manner upon the rights of employees guaranteed by Section 7 of the Act.

Decision and Order of the National Labor Relations Board and Trial Examiner's Intermediate Report, June 30, 1961, 131 NLRB 1444.

ORDER

Upon the entire record in this case and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Jack G. Buncher, d/b/a The Buncher Company, his officer, agents, successors, and assign, shall:

1. Cease and desist from:

(a) Interrogating his employees as to their membership in, or activities on behalf of United Steelworkers of America, AFL-CIO, or any other labor organization in a manner constituting interference, restraint, or coercion in violation of Section 8(a)(1) of the Act.

(b) Threatening reprisals against his employees because of their union activities and sympathies or promising benefits to his employees if they will abandon the Union.

(c) Requesting employees to engage in surveillance of the union activities of other employees and report such to the Respondent.

(d) Making statements or engaging in conduct designed to make its employees believe that Respondent is engaging in surveillance of their union activities.

(e) Soliciting, urging, or directing employees to join or assist Local 178 or any other labor organization not of their own choosing, except to the extent that said rights to join or assist labor organizations or to refrain from

such may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act as modified by the Labor-Management Reporting and Disclosure Act of 1959.

(f) Discouraging membership in United Steelworkers of America, AFL-CIO, or any other labor organization of his employees, by discharging or refusing to reinstate any of his employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition of employment.

(g) In any other manner, interfering with, restraining, or coercing his employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to the employees listed in Appendix A immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings suffered as a result of the discrimination against them, in the manner described in the section of this Decision and Order entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records neces-

sary to determine employment rights and the amount of backpay due.

(c) Post at his facilities called Nine Mile Run, Leetsdale, and North Side locations in Pittsburgh, Pennsylvania, copies of the notice attached hereto marked "Appendix B."[2] Copies of said notice, to be furnished by the Regional Director for the Sixth Region shall, after being signed by Respondent or his representatives, be posted by Respondent immediately upon receipt thereof and be maintained by him for 60 days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Sixth Region in writing, within 10 days from the date of receipt of this Order, what steps the Respondent has taken to comply therewith.

APPENDIX A

John A. Cindrick	Ronald W. Loughner
James H. Roth	Samuel Rutherford
Milton Ashford	Archie Jackson
Henry C. Ivy	John West
Joseph Wytiaz	William Greene
George Collier	James Cindrick
Robert Vinsick	

[2] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

Decision and Order of the National Labor Relations Board and Trial Examiner's Intermediate Report, June 30, 1961, 131 NLRB 1444.

APPENDIX B

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in United Steelworkers of America, AFL-CIO, or any other labor organization by discriminating in respect to the hire, tenure, or other conditions of employment of any employee except as authorized by the proviso to Section 8(a)(3) of the Act.

WE WILL NOT threaten employees with loss of employment because of their union activities or promise them benefits if they will abandon the Union.

WE WILL NOT interrogate employees.

WE WILL NOT ask employees to engage in surveillance of the union activities of other employees and report to management.

WE WILL NOT tell employees that their union activities are known to us.

WE WILL NOT urge, solicit, or direct employees to join Local 178, House Wreckers and Scrap Yard Laborers' Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form organizations,

to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

WE WILL offer to those individuals found discriminated against immediate and full reinstatement to their former, or substantially equivalent positions, without prejudice to their seniority and other rights and privileges.

WE WILL make whole those individuals found discriminated against for any loss they may have suffered as a result of the discrimination against them.

All our employees are free to become, remain or refrain from becoming, members of United Steelworkers of America, AFL-CIO, or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8(a)(3) of the Act.

JACK G. BUNCHER, d/b/a
THE BUNCHER COMPANY
Employer.

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered defaced, or covered by any other material.

Decision and Order of the National Labor Relations Board and Trial Examiner's Intermediate Report, June 30, 1961, 131 NLRB 1444.

INTERMEDIATE REPORT

STATEMENT OF THE CASE

This proceeding, brought under Section 10(b) of the National Labor Relations Act, herein called the Act, was heard in Pittsburgh, Pennsylvania, on May 2, 3, 4, 5, 6, 10, 11, 12, 13, 17, 18 and 19, 1960, pursuant to due notice to all parties. The complaint, issued by the General Counsel of the National Labor Relations Board, and based on charges duly filed and served, alleged that the Respondent had engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act. In its answer the Respondent conceded that it was engaged in commerce within the meaning of the Act, but denied the commission of any unfair labor practices.

At the hearing all parties were afforded full opportunity to be heard, to examine and cross examine witnesses, to introduce evidence and argue orally. Oral argument was waived. Subsequent to the hearing, on July 25, 1960, counsel for the General Counsel and for the Respondent submitted briefs which have been fully considered.

Upon the entire record[1] in the case, and from my observation of the witnesses, I make the following:

[1] The Union's motion to admit in evidence the Regional Director's report on objections and challenged ballots in Case No. 6-RC-2513, which Respondent opposes, is granted but only to the extent that it shows, as part of the chronology of that case about which some evidence was taken at the hearing in the instant case, that such a report was issued by the Regional Director on June 20, 1960.

Decision and Order of the National Labor Relations Board and Trial Examiner's Intermediate Report, June 30, 1961, 131 NLRB 1444.

FINDINGS OF FACT

I. The Business of the Respondent

The Buncher Company, herein called the Respondent or Company, is a sole proprietorship of Jack G. Buncher, who is engaged in the business of scrap brokering, scrap reclamation, and construction and leasing of buildings in and around Pittsburgh, Pennsylvania. At its location at Nine Mile Run in Pittsburgh, Pennsylvania, the Respondent during the 12-month period ending December 31, 1959, reclaimed and sold certain materials to the Jones & Laughlin Steel Corporation, of a value of more than $50,000. The Respondent concedes, and I find, that Jack G. Buncher, doing business as, The Buncher Company, is engaged in commerce within the meaning of the Act.

II. The Labor Organizations Involved

United Steelworkers of America, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2, subsection (5) of the Act.

House Wreckers and Scrap Yard Laborers' Local Union 178, affiliated with the International Hod Carriers', Building and Common Laborers' Union of America, AFL-CIO, herein called Local 178, is a labor organization within the meaning of the Act.

Decision and Order of the National Labor Relations Board and Trial Examiner's Intermediate Report, June 30, 1961, 131 NLRB 1444.

III. The Unfair Labor Practices

A. *The setting and the issues*

During the pay week ending January 14, 1960, Respondent employed 34 production and maintenance employees at Nine Mile Run, the operation with which we are primarily concerned. On the evening of January 13, 1960, 22 employees of the Company attended a meeting at the Union's subdistrict office in Homestead, Pennsylvania, and all signed applications for membership in the Union. On January 14, Mr. M. Peter Jackson, subdistrict director of the Union, dictated and mailed to Mr. Jack G. Buncher, president of the Company, a registered letter advising him that a majority of the employees of the Nine Mile Run location had designated the Union as their representative and asking for a meeting to negotiate a labor agreement. The letter from the Union was delivered to the Company on the morning of January 15 but there is a dispute about whether it was actually opened or read by anyone before the afternoon of January 19.

On January 18, the Union filed a petition for election under Section 9(c) of the Act with the Board. After hearing the Board issued a Decision and Direction of Election.[2] The election has been held but because of certain challenged ballots the results are inconclusive and the matter remains pending before the Board.

On January 15 the Company laid off five employees and subsequently laid off eight others. All 13 had attended the

[2] Case No. 6-RC-2513, not published in NLRB volumes.

union meeting on January 13 and signed application cards for the Union.

It is the General Counsel's position that, when the Respondent learned that the Union claimed to represent a majority of its employees, it commenced a campaign to destroy that majority and used as its weapons the illegal discharge of 13 known union adherents and certain other acts of interference, restraint, and coercion. Respondent, on the other hand, denies any knowledge of the organizational activities of its employees or that it discussed the Union with them in any manner or at any time. With respect to the discharges, Respondent contends they were all based on economic considerations and were totally unrelated to any union activity on the part of any employee.

B. *The evidence as to alleged violations of Section 8(a)(1) of the Act; findings and conclusions with respect thereto*

1. General acts of interference, restraint, and coercion

Employee John Cindrick signed a union card, on January 13, 1960, at the union hall, as did 21 other employees. On January 15, while working at his job, he was approached by Herbert Green, general manager of the Company and formerly superintendent of the Nine Mile Run operation, and asked if he knew of any union meetings or of union cards being passed out which Cindrick denied. Green told the employees that he had a letter from the Union stating that the Union represented a majority of the men and asked Cindrick if he knew anything about it. Green also told Cindrick, at that time, that there was a

limit to what the Company could pay and that Jack Buncher, president of Respondent, was looking for an excuse to shut the job down and that "this would probably be it." Green added that everyone would probably be out of work but that he would still have his job.

General Manager Green also asked employee William Greene, on January 15, if there was anything Green should know. Greene denied that there was, although he had also signed a union card on the 13th. He was told by General Manager Green that Jack Buncher would probably be out on the job early Monday morning "with fire in his eyes" and that Jack Buncher would shut the job down "over something like this." The next day Green again approached employee Greene on the job and repeated his inquiry of the previous day about whether or not anything was going on. He then told the employees, "Let's face it Bob, I squashed a thing like this once before." In this conversation Greene was told by his superior that a "couple of silly bastards around here wanted a union" and if he could find the ringleader he could "squash this thing." On January 18, Greene was summoned to the office where he saw Jack Buncher and Herbert Green. Buncher asked Greene if he wanted to tell him anything about what was going on. Later in the day Greene was again called in and told by Buncher that he had been turned in "as being the ring leader in this." On January 20, employee Greene was summoned to the office and again confronted by Buncher and Green. Buncher told him to "keep quiet" that Buncher was "going to tell me for a change." Buncher was interrupted by a

telephone call and Green took up the conversation with the employee. He told him that the Company had a raise in store for the men to take effect at the end of 1959 which was prevented by the steel strike, but that the Company was working on a hospitalization plan for the men.

On January 15, at about 10:30 a. m. employee James Roth was questioned by Moses Pasquarelli, superintendent of the plant, who asked him if he knew anything about the Union, and added that "We want to get rid of the guys and get back to normal." Roth denied knowledge of any activity but was told by Pasquarelli, "Don't be afraid of your job. Let me know."

Milton Ashford was questioned in the company office by Herbert Green on January 15 and asked if he knew anything about a union or had talked with anyone from the Union. He repeatedly denied it and was asked if he were sure. Green told him that the Company had received a letter from the Union.

On January 18, John Edditor was sent to the office where he was interviewed by Jack Buncher and Herbert Green. He was asked if he knew anything about the Union and told that the Company wanted to stop the Union because it was not the proper union for the employees. Buncher and Green interviewed Edditor again the next day and either Green or Buncher told the employee that Respondent knew who was at the union meeting.[3]

[3] In some instances, where an employee had been interviewed by Buncher and Green at the same time he could not remember which official made the remark in question.

Decision and Order of the National Labor Relations Board and Trial Examiner's Intermediate Report, June 30, 1961, 131 NLRB 1444.

Charles Epps was sent for by company officials, Buncher and Green, on January 18 and questioned about the Union. Buncher told the employee "that there was just a few bad apples that convinced the men that the union was best for them, and that he wanted to get rid of the bad apples." Buncher persistently inquired of Epps whether employee George Collier had given Epps a card or talked to anyone about the Union. Buncher told Epps that anything he had to disclose would be kept confidential and that his and Green's telephone numbers were in the book. Buncher also stated that he did not want to shut the plant down but that he would before he let the Union in. The next day Green talked to Epps and told him "how nice the company had been to us, and how the guys he has helped out of trouble, and he didn't see why we wanted to get in the union." Green reminded the employee that he got a vacation every year and a raise when the Company could afford it and asked Epps how the employees were thinking.

Aaron Scott was interviewed in the office by company officials three times after he attended the union meeting and signed a card. In his first interview with Jack Buncher he was asked if he "knew what he was there for" and if he had gone to the meeting in Homestead. The employee admitted that he had and Buncher asked him who else was there which the employee refused to divulge. Later in the day Scott was called back to the office and talked to by Buncher and Green. Buncher again attempted to find out who was at the union meeting and Green reminded the employee of kindnesses done to him in the past. Buncher told Scott he was either for Buncher or against him. On

leaving the office Scott was told to "think it over." The next day Scott was again called to the office and met Green and Buncher. Buncher told the employee that he had found out what he wanted to know because six or seven employees had gone to Green's home and told him.

On April 17, the day before the election conducted by the Board for the employees at Nine Mile Run, Jack Buncher spoke to Scott. Buncher asked Scott if he had a cancer in his leg, whether he would cut it off to save the rest of his body and Scott stated he would. Buncher agreed he would do the same and said that if the Union got in at Nine Mile Run then "Beetsdale and Shore Avenue would want one."[4]

Ronald Loughner was asked by Herbert Green, on January 18, 1960, ". . . what do you know about this union deal?" Green then asked him if he went to a meeting or signed a card. Later in the day Loughner was sent to the office where he met Jack Buncher and Green. Buncher asked him if he knew why he was there and Loughner surmised it was "the union deal" to which Buncher agreed. Buncher reminded Loughner that the Company "thinks the world and all of you" and asked him if he knew anything to tell him. Loughner pleaded ignorance and Buncher told him to let him or Green know if he found out anything. Later in the day Loughner was again called back to the office by Green. Green, in Buncher's presence, told Loughner, "some of the colored boys is trying to involve you whites in on this deal. If you know anything,

[4] Respondent's other operations.

tell me." Loughner again feigned ignorance and Buncher stated that he would believe him "for now." The next day Green approached Loughner where he was working and reproached him for lying on the previous day. He then called the employee a "no good, ignorant liar." On this occasion Green had a piece of paper with him and informed Loughner that he had his name as well as others on the list.

Superintendent Pasquarelli told employee George Collier, on January 15, that the Company had received a letter from the Union claiming a majority of employees, that he did not believe the claim and was counting the employees, and that the Company would shut down the Nine Mile Run operation rather than let the Union come in. In response to a question by Collier about the equipment, Pasquarelli said it would be sold. He added that Herbert Green had called Jack Buncher in Florida and that Buncher had said that he would shut down before he let the Union come in. Pasquarelli also stated that Buncher did not want to have anymore to do with the men since they had knifed him in the back after he had been good to them during the steel strike. Pasquarelli, at the end of the conversation, told Collier, in response to another question by Collier, that there was plenty of work but that the Company was "not going for this union deal."

Collier was also called to the company office on January 18 where he saw Buncher and Green. Buncher told Collier that he was there because of the union business and that he might "as well come clean" since Buncher

knew that he had passed out union cards. Collier denied it and was told he was lying. Green asked Collier who he rode with and who his friends were. Buncher told him that he was interested only in the ringleaders and that he did not want the employee "that went along just to follow the crowd." Buncher told the employee that a "similar thing" happened once before and the Company solved it by getting rid of the ringleaders, shutting down and then reopening. Collier refused to give the Company any information despite suggestions by Green or Buncher that the conference was "confidential," that Collier could call them if he changed his mind, that Collier had a family to consider, that he had always worked steady, that he was "messing up" a good job and a statement by Buncher to Green during the meeting as follows: "Damn it, Herb, I'm going to change my tactics."

Robert Vinsick, while at work on January 18, was asked by Green whether he had gone to "that meeting the other night" and if he knew of a meeting. Vinsick disclaimed knowledge but Green told him that he had heard that Vinsick had gone to the meeting and signed a card. Vinsick denied the fact but Green persisted by asking him if he were sure and whether anyone had approached Vinsick with a union card. Later that day Vinsick was also called to the office and saw Buncher and Green. Buncher asked him if he knew why he was there and Vinsick volunteered that it was on account of the Union to which Buncher agreed. Buncher then asked him if John Cindrick had approached him about joining the Union and stated that he knew Vinsick rode home with Cindrick and his brother.

Buncher said that he thought John Cindrick was the ringleader.

On January 19, Herbert Green again talked to Vinsick at Vinsick's working station. Green reproached Vinsick for lying to him on the previous day despite the fact that Green trusted Vinsick. Vinsick denied lying but Green told him he had his name on a list along with other employees.

Sammie Lee Rutherford[5] was interviewed by Jack Buncher, on January 18, in the company office and asked what he had heard about the Union. Buncher stated that if the Union got in he would have to close the plant down but that he had enough money for himself. Buncher then asked Rutherford to let him or Green know if he heard anything about the union meeting. Later that day Rutherford was again invited to the office and Buncher and Green talked to him. The company officials on this occasion wanted to know where the employee had gone after work, who rode with him, whether he went to a meeting and whether he met certain employees, including Aaron Scott and Henry Ivy.

Archie Jackson was also interviewed by Buncher in the company office about January 20. Buncher asked him if he knew anything about a union, referred to the fact that Jackson was a single man, and asked if he intended to get married. Buncher reminded the employee that the Company had taken care of the men during the strike, meaning that they had worked during the long steel strike of 1959.

[5] Called Samuel Rutherford in the complaint.

Buncher and Green also questioned James Cindrick in the office on January 18. Cindrick's brother John had been laid off on the 15th of January and Buncher told James to tell his brother that if he let Buncher know what he knew he would give him his job back. Herbert Green added that he would do better than that, he would pay James for every day he was off. Two weeks later Buncher saw James Cindrick at his job location and told him that if his brother would come and talk to Buncher he would have a job with the Company. The references in these conversations to what an employee "knew" were clearly meant and understood to mean knowledge about the Union, and I so find. Similarly Herbert Green asked Cindrick on the 15th of January what he knew "about this."

On about January 18, employee West was called to the office and asked by Buncher in Green's presence if he was "satisfied with what was going on." West feigned ignorance and Buncher asked him if he had heard anything about a union. Buncher told West that, if he considered himself a friend, he would be expected to tell Buncher what he heard. Buncher told West that he looked "like a pretty nice fellow" and that perhaps Buncher could help him someday. A few days later, West was transferred to the Leetsdale operation of the Company, and, within a few weeks, he was sent in to see Buncher. Buncher told him that he needed only a certain number of men to operate the Nine Mile Run operation and, if there was a layoff, and if the Union got in, the men with the least seniority, like West, would be laid off first. Buncher told West that without a

union, Buncher would see to it that his "friends" worked. Buncher appealed to West's loyalty stating that he wished he was as loyal as West's mother-in-law who had worked for Buncher's deceased brother. In this conversation Buncher said if the Union got in he would shut the place down. Buncher concluded the interview by telling the employee that he was surprised not to see him with a group of employees who came to Buncher's home and gave him some information about the Union, and that if West ever had any reason to come and see Buncher to stop at the office "any time."

George Parks, a few days after he signed a union card at the January 13 meeting, was told by Superintendent Pasquarelli that there was a rumor that some of the men were talking about starting a union and asked if he knew anything about it. Later Parks was sent for and talked to by Buncher and Green in the office and asked if he knew who signed cards. Buncher or Green told him that "if they could get to the bottom of it, find out who started it, well, maybe they could take and stop it, . . . there wasn't going to be no union." Buncher also told the employee that "they would take and close the place down before they would have a union."

Pasquarelli asked Leland Shearer, on January 15, who and how many employees had signed cards, and stated that he thought Shearer would tell him, because he was going to take care of Shearer. On or about the 18th of January, Shearer was also sent to the company office and questioned by Green and Buncher about the Union. The company

officials wanted to know the names and number of employees who had signed union cards. Buncher asked Shearer to let him know if he heard anything and Shearer said he would. The next day Shearer was again called into the office with his brother Harland Shearer, also an employee of the Company. In this meeting the employees were told by Buncher that they were lying when they said they knew nothing of the Union and were informed that they would be the first to be laid off if the Union got in since they had the least seniority. Either Buncher or Green asked the employees if they would be willing to go with a group to the Union and get their application cards back. On April 18, Leland Shearer was in the company office with Buncher, Green, and one Emanuel Reich, who was introduced as "a financial adviser." All three men participated in the discussion and the employee was told that the Company did not want the Union and that the Company would close down if the Union came in. The employee was invited to a party for employees to be given by the Company that night. It is to be noted that the National Labor Relations Board election for the Buncher Company employees took place the next day.[1]

Harland Shearer, Leland's brother was also questioned alone and with his brother by company officials. On January 18, Green asked him if he knew anything about the Union and Buncher or Green said that a union had tried to get in once before but the Company had gotten rid of it. The next day the employee was interviewed again and asked if it were possible that employee Loughner had

signed a card. Harland Shearer also corroborated his brother's testimony about the joint interview of the employees. Green and Buncher also talked to Harland Shearer a few days before the Board election of April 19. Green called the employee off the job and asked him how he was going to vote. When the employee told Green that things looked bad for the Company he was asked to point out the section of the operation where the employees were opposed to the Company. Later, on the same day, Jack Buncher talked with Shearer on the job and told him that if the Union came in he would close down. Buncher described the Union as a cancer which should be cut out.

2. Acts of interference, restraint, and coercion relating to Local 178

The complaint, as amended, alleged that Respondent distributed to employees membership cards and urged and directed employees to join and sign for Local 178.

As set forth above employee Edditor was told, when interviewed on January 18 in the company office, that the Company wanted to stop the Union because it was not the proper union for the employees. On January 22 Edditor was sent to the company office again and there Green told him "I told you that I would get you boys a union, the right union" and gave Edditor an application card for Local 178, told him to sign it, Edditor did and left the card with Green. Green gave Edditor other Local 178 cards with instructions to pass them out to the employees. General Manager Green also had Epps sign a card for Local 178 and subsequently signed up Jackson, Aaron Scott and

the Shearer brothers. Superintendent Pasquarelli gave employee Parks a card in Local 178 and told Parks that Green wanted to know whether he would sign it. Parks did.

It is clear from the evidence set forth above that the General Counsel made an extremely strong *prima facie* case of interference, restraint, and coercion of employees by the Respondent. Respondent's witnesses, however, denied every remark attributed to them by the witnesses for the General Counsel. On the basis of my observation of the witnesses, and for the following additional reasons, I do not credit Respondent's denials and find that the events and statements described above by witnesses for the General Counsel did occur:

Seventeen witnesses with obviously different backgrounds, degrees of education, experience, and intelligence were called by General Counsel and testified about the matters set forth above, and described a variety of techniques of persuasion and acts of interference, occurring, in some cases, on two or three occasions and engaged in by different company officials. Careful examination of their testimony, and recall of the demeanor of the witnesses at the hearing, reveals no evidence of a rehearsed or concocted story but a pattern of conduct on Respondent's part which is plausible and likely. In the remarks attributed by the employees to management, there appeared a conscious tailoring by company officials to fit the particular employee involved. For example, if the employee were single, as in Jackson's case, Respondent inquired if he

intended to get married, but if he were married, as in Collier's case, it was suggested that he had a family to consider. Similarly, newly hired employees like West and the Shearer brothers were reminded of their lack of seniority in the event of a layoff, but others were appealed to on the basis of loyalty or gratitude for past favors. Brothers and cousins were interviewed together (the Shearers, Jackson, and Epps), some employees were flattered like Loughner who the Company thought "the world and all of you" but others, were liars and "silly bastards"; threats were mingled with promises and cajolery with more forceful oral pressure. Buncher told Green that he would change his tactics and he did with versatility. There was something for every employee in the dialogue and to credit the employees with a fabricated script in the circumstances would be to postulate a fantastic conspiracy on their part. This I am unable to do. With due regard to minor inconsistencies and inaccuracies, frequently found in the testimony of witnesses, their complete account reveals a cohesive and believable whole.

On the other hand, I am unable to accept the Company's complete disavowal of knowledge of the employees' union activity, its disclaimer of even the slightest discussion of it with employees and its purported casual attitude or disinterest in the matter, even among company officials. In addition to the statements made to employees demonstrating awareness of union activity, the following are also significant.

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The Buncher Company has never been organized by a union. The registered letter from the Union, asserting that a majority of the employees had selected the Union and requesting a conference, arrived at the company office at 10 a. m., January 15. This letter started a chain of events which included conferences with union representatives, charges of unfair labor practices, and a petition for an election, which took place about 3 months later. When the letter was received Jack Buncher was in Florida, where he remained until January 17, when he returned to Pittsburgh. Respondent asserts that the letter from the Union remained unopened in its office until the afternoon of January 19, but I do not credit its testimony to that effect. The evidence shows that a long-distance call was made from the company office to Buncher, in Florida, at 11:16 a. m., January 15. General Manager Green, who is in complete charge of the Company in Buncher's frequent absences, keeps in touch with Buncher by mail and telephone, as does James Gambone, the Respondent's office manager and accountant. Gambone looks to Green for guidance in Buncher's absence and although he handled the registered letter, enclosed in a union envelope, on the 15th and had never seen a similar communication from a union before in his many years with the Company, did not, according to him, bring it to Green's attention. Both he and Green were vague about any calls made to Buncher during his absence but Green admitted that he may have talked with Buncher on the 15th. Buncher, under cross examination, was equally vague about talking to Green long distance on January 15, admitting only that it was pos-

sible, but asserting he did not know whether he had a conversation or not. After Buncher had testified, and during the presentation of Respondent's case, General Counsel called out of order Robert Embree, an employee of the Bell Telephone Company, who testified that a person to person call was placed and completed to Jack Buncher from the Buncher Company, on January 15, and lasted for 12 minutes. The next day Jack Buncher was recalled and testified that he spoke to his office from Florida on January 12, 14, and 15 but that the January 15 conversation had nothing at all to do with union activity of his employees. I find that during Buncher's, Green's and Gambone's cross examination by General Counsel they were aware of the January 15 telephone call and that they were purposely vague about it until General Counsel produced a witness from the telephone company. Only then did Buncher remember the call and recall that it had nothing to do with union activity. The Company's reluctance to admit the fact of the call earlier is evidence from which I may and do infer that it pertained to the contents of the letter from the Union, and I so find.

Additional reasons for crediting the employees' account of their employer's knowledge and interest in their union activity are found in Respondent's implausible description of the actions and reactions of company officials on and after January 19, the date on which Buncher testified he saw or learned of the union communication for the first time. Buncher returned from Florida on Sunday evening, January 17, and, according to him did not go to his office at the North Shore location until the afternoon of the 19th

and was not informed by his office during that time that a letter had been received from the Union. On the 18th and the morning of the 19th of January, he spent all day at Nine Mile Run going over all jobs which the Company intended to eliminate. When he got to his office after lunch, an envelope containing unopened mail, received during his absence, was handed to him, and he proceeded to open the contents which included the Union's demand and letters from the National Labor Relations Board enclosing a petition for election filed by the Union, and a charge of unfair labor practices. Buncher stated that he showed Green the union letter and asked him what he knew of the situation. Green, according to Buncher, said he knew nothing and that is "all I did at the time." Buncher made it clear to Green that as far as union activity was concerned Green was to leave it alone. In Buncher's words, "I would take care of it. It was up to me." Buncher, according to him, had no further discussions with Green or any other supervisor about the union matter and a few days later he returned to Florida. He did not believe, he testified, that the Union represented a majority of his employees, as the Union claimed, yet he discussed the matter with none of his officials. Buncher's complete casualness and disinterest is difficult to believe. He explained his aloofness on the ground that the employees would eventually vote in an election and that would be the end of the matter; yet at another point, he testified that he was inexperienced in these matters and did not know where the petition filed by the Union with the Board for an election would lead.

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Green's account of his reactions upon receipt of the Union's demand is equally unrealistic and implausible. Green, like Buncher, did not believe the Union's claim of majority status. Although he was completely in charge of all operations in Buncher's absence, and was in the middle of a serious layoff problem, to be described in more detail in section III, C, below, and although Buncher would leave the city again as he frequently did, he engaged in no discussions with Buncher about the union demand, or the letters from the Board about the charges or the election petition, and never discussed them with his superintendent, Pasquarelli, who was in complete charge of the Nine Mile Run operation, except to casually mention it to him and immediately drop the subject. He testified that he told Pasquarelli only that "there was something going on between the Steelworkers and the men out here. I think I mentioned that Jack received a letter from the Steelworkers, or something, to the effect they represent the men out at the job." Pasquarelli's reaction was an equally cool but unbelievable "Is that right" when Green told him about the letter. He proceeded about his business, according to him, and although he saw Green practically every day, the employees and their union activities were never mentioned again.

On the basis of all above, therefore, I find that the witnesses for the General Counsel testified credibly about the alleged acts of interference, restraint, and coercion and that Respondent's denials are not to be credited. I find, further, and conclude, that Respondent by (a) interrogat-

ing employees about their union activities and the activities of other employees; (b) threatening employees with loss of employment if they continued in their union activities; (c) promising employees benefits if they would discontinue their union activities; (d) requesting employees to engage in surveillance of the union activities of other employees and report said activities to the Respondent; (e) soliciting and directing employees to join or assist Local 178; and (f) statements and conduct causing employees to believe that Respondent was engaging in surveillance of their union activities, has interfered with, restrained, and coerced employees in the exercise of rights guaranteed them under the provisions of Section 7 of the Act and has thus engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. Alleged acts of interference committed by Robert McNabb and James Maynard whose supervisory status is in issue; findings and conclusions with respect thereto

Considerable testimony was taken about the supervisory status of McNabb and Maynard. A review of the entire record, however, reveals no statement or action by Maynard which could constitute a violation of the Act even if he were a supervisor under the Act. I find it necessary, therefore, to treat only with McNabb's alleged supervisory authority. McNabb did make statements to employees which, if binding on Respondent, would be a violation of Section 8(a)(1) of the Act. He told John Cindrick, for example, that the job would be shut down because a few

"silly men", wanted a union and he made substantially the same remark to Collier.

McNabb denied all remarks attributed to him by employees, but I do not believe him. McNabb's demeanor was poor; he was evasive, visibly frightened or embarrassed and clearly reluctant to tell a straight story. His account of how he happened to sign a card for Local 178 was fantastic. I find that McNabb did make the statements and others like them set forth above. On the other hand, although I do not credit McNabb generally, I find on the basis of other testimony in the record that he is not a supervisor under the Act. Some of General Counsel's employee witnesses described McNabb as a "boss" but he was also described by others as a "pusher," which in plant idiom is less than a "boss" or actual supervisor. The record is clear that McNabb had no power to hire or fire, transfer, suspend, lay off, recall, promote, reward or discipline other employees, nor is there any evidence that he ever recommended such action effectively. The record is also silent about any grievance McNabb adjusted but, on the other hand, at least one employee testified that only Pasquarelli could do that. The little evidence in the record indicates that employee personal problems, such as time off, would have to be resolved by Pasquarelli.

It appears that the extent of McNabb's authority is to assign and direct men. Employees generally testified that he tells them what to do, when to do it and where to do it. There is no evidence that McNabb, however, uses independent judgment in the assignment or direction of the men.

McNabb is a mechanic and the record is clear that he spends a substantial part of his time, perhaps as much or more than 50 percent, working along with the rest of the men. Pasquarelli testified that he instructs McNabb where he wants the power equipment moved or what repairs he wants made, and designates the man or crew that McNabb shall use and McNabb merely transmits the instructions. There is no evidence to controvert this testimony in the record. McNabb is hourly paid, receives overtime for extra hours worked and his hourly rate is lower than a number of other employees. On the basis of the entire record I find that McNabb's assignments and directions do not involve the exercise of independent judgment but are of a routine nature, and that since there are no other indicia of his supervisory authority in the record he is not a supervisor within the meaning of Section 2(11) of the Act.

C. *The discriminatory terminations and transfers; findings and conclusions with respect thereto*

The complaint, as amended at the hearing, alleged that Respondent discriminatorily discharged 13 employees and discriminatorily transferred 3 of them to other locations of Respondent prior to their terminations. The alleged discriminatees and dates of severance and transfer are as follows:

John A. Cindrick, 1-15-60.
James H. Roth, 1-15-60.
Milton Ashford, 1-15-60.

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Henry Ivy, 1-15-60.
Joseph Wytiaz, 1-15-60.
George Collier, 1-18-60.
Robert Vinsick, 1-19-60.
Ronald Loughner, 1-19-60.
Samuel Rutherford (transferred) 1-19-60, (terminated) 2-4-60.
Archie Jackson, 2-12-60.
John West (transferred) 1-24-60, (terminated) 2-12-60.
William Greene (transferred) 2-8-60, (terminated) 2-19-60.
James Cindrick, 3-4-60.

The above employees make up the total of 13 employees laid off by the Company. All of the alleged discriminatees joined the Union on January 13, 1960, all, with the exception of Ivy and Wytiaz, were questioned shortly thereafter about the Union, some were laid off or transferred on the day of their interrogation[6] and most within 48 hours to 3 weeks from the date they joined the Union. The employees, with one exception, had not been reprimanded about their work in any way; Jack Buncher admitted that there was nothing seriously wrong with the work of any of them and that they would be rehired if needed. None of the 22 employees remaining after the layoff who did not join the Union were affected in the layoff and some of the employees retained had less service with the Company than those let go. The Company made it its business to find out who had joined the Union and admitted to certain em-

[6] John Cindrick, Roth, Ashford, Loughner, Collier, Vinsick and Rutherford.

ployees that it had a list of union adherents. The layoff occurred in a context of improper interrogation, and threats of reprisal demonstrating, along with other acts of interference described in more detail above, a clear anti-union animus.

It would appear, therefore, that the General Counsel made out a strong *prima facie* case of discrimination. The Respondent, on the other hand, made out a strong case that the layoffs were economically justifiable. The existence of economic reasons in a reduction in employment is not controlling, however, where there also exists reasons which are concerned with employees' activity protected by the Act. In such a case all circumstances must be weighed to determine what really motivated the employer in the layoff. As a corollary, the existence of valid reasons for discharge is no defense if the selection of employees for termination is illegally motivated in a proper reduction in staff.[7]

With respect to the economic and business reasons, asserted by Respondent as the only considerations entering into its decision to lay off the 13 employees in question, Respondent introduced considerable oral and documentary evidence which I find established the following:

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[7] *N. L. R. B. v. Whitin Machine Works*, 204 F. 2d 883, 885 (C. A. 1); *N. L. R. B. v. Solo Cup Company*, 237 F. 2d 521, 525 (C. A. 8); *N. L. R. B. v. Jamestown Sterling Corp.*, 211 F. 2d 725 (C. A. 2); *N. L. R. B. v. Jones Sausage Company, et al.*, 257 F. 2d 878 (C. A. 4); *E. E. Majeroni et al., d/b/a Home Restaurant Drive-in*, 127 NLRB 635; *Lithium Corporation of America, Inc.*, 116 NLRB 602; *William A. Mosow*, 92 NLRB 1727; *Layton Oil Company*, 128 NLRB 252.

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The Nine Mile Run operation of Respondent, with which we are primarily concerned, consists of two plants, the function of both being to reclaim and separate iron from nonferrous or waste material commonly called slag. The ferrous material is obtained from two sources, slag from the Jones and Laughlin mill, brought to the Nine Mile Run operation by barge, and from the Duquesne Slag Company dump at Nine Mile Run. This dump consists of an area of about 200 acres. The Respondent started with a very small and simple operation in 1951 and with the use of a crane, a power shovel, and a bulldozer, dug and reclaimed scrap from the dump with the use of a magnet operated on a crane. Next the Company designed a small portable plant and then developed two intricate and integrated permanent plants by a process of redesigning, reconstructing, and modifying over the years up to and through the strike period in the basic steel industry ending in November 1959. Through the strike period there were 34 or 35 employees employed in the operation of 1 of the 2 plants, in operating the equipment and in constructing and modifying the various components of both plants. The Respondent asserts that it decided it had too many employees on the payroll and determined to eliminate a number of them. When and how this decision was made is in dispute and will be considered later. We will confine ourselves, at this point, to the basic economic considerations.

In the process of extracting ferrous material the raw material, the slag, is dug from the dump by power shovels and loaded into trucks which transport it to the plants where it is dumped into hoppers. The material is then

conveyed through the plant, and by the use of magnets, shaking and fractionating, the fine ferrous end product is obtained. Prior to January 15, 1960, three power shovels were used but after the 18th of January only one was operated which fed the plant to capacity. In December 1959, total loads of raw material dumped into both plants for processing was 5,767; in January 1960, it was 5,161; in February, it was 6,278; in March, 6,441; and in April, 6,474. Between December 1, 1959, and January 15, 1960, however, the date of the first layoff, the crew size ranged from 32 to 34. Between January 20 and April 30, 1960, the crew size ranged from 20 to 24 with 22 predominating. The increase in productivity of approximately 11 percent in April over the previous December was accomplished with a cutback in the work force of approximately 35 percent. Shipments to Jones & Laughlin in the first 4 months of 1960 of ferrous material were only insignificantly lower than in the first 4 months of 1959.

An analysis of the number of regular and overtime hours of employees during representative periods before and after the layoff such as in 1957, 1958, 1959, and 1960, shows no abnormality. As a result of the reduction in work force, without any loss in production or productivity, Respondent has made savings in wages of $1,464.55 per week and a total saving from the day of the first layoff, January 15 to April 28, 1960 (immediately prior to the hearing in this case), of $19,293.48.

Other factors substantiate the Respondent's position that there existed good business reasons for the reduction

in force. For example, of the original 200 acres of the slag dump only 7 or 8 acres remained to be worked. This small acreage will take only about 1½ to 2 years to process which was a factor in limiting the capital investment on the jobsite and in addition the small area remaining for processing did not require the same amount of heavy equipment such as shovels and hi-lifts.

I find on the basis of the above evidence that there existed at the time of the layoff in question economic justification for a reduction in staff under normal business practices. All circumstances must be considered, however, in determining what motivated the Respondent in making the reductions.

The General Counsel urges that the timing of the terminations, among other things, beginning on the very day the Union's letter requesting recognition was received, indicates that the discharges were discriminatorily motivated, and I agree.[8] The Company contends, however, and offered evidence to show that the layoff had been under consideration since early December 1959 and that it had no knowledge of any employee union activity before Buncher opened the letter from the Union, which he maintains was sometime during the afternoon of January 19.

In subsection B, above, I found that the Respondent knew as early as January 15, 1960, that its employees had interested themselves in the union and it is unnecessary to repeat the basis for that finding here. With respect to the

[8] *N. L. R. B. v. Southern Desk Co.*, 246 F. 2d 53, 54 (C. A. 4); *Special Wire Goods, Inc.*, 115 NLRB 67, 80.

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Company's claimed prior plan and preparations for a layoff, however, Respondent offered the following evidence. General Manager Green testified, that he had a conversation with Jack Buncher sometime prior to Christmas 1959 about the Nine Mile Run operation, that Buncher was dissatisfied with the number of personnel and wanted to start "depleting the force." On Green's suggestion it was decided not to do anything about the matter until after the approaching holidays. On January 2, 1960, according to Green, he went to the Nine Mile Run operation and toured the facility with Superintendent Pasquarelli checking where changes in the staff could be made. On January 4 he again went over the layoff problem with Pasquarelli in the latter's office but the final determination to lay off five men was not made until January 11 to be effective January 15. This, of course, would have been before Respondent knew that anyone attended a union meeting or engaged in union activity as far as the record in the case is concerned. It appears that Jack Buncher had returned to Florida about January 7 and did not return to Pittsburgh until January 17, 1960. Green testified that on Buncher's return he called Green and inquired about the cutback, but became very provoked when Green told him he had laid off only five men on the 15th. Buncher said he had meant "more like fifteen." Green questioned that figure but Buncher told him that nevertheless Buncher was going to the job to inspect it and see what he could do. He told Green to meet him at Nine Mile Run the following morning, January 18, which Green did.

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On Monday morning January 18 Buncher and Green made a tour of the Nine Mile Run location checking jobs and, according to Green, Buncher checked off jobs that could be eliminated. On that day the Company terminated Collier and subsequently terminated or transferred the other complainants.

Jack Buncher testified that he definitely reached the conclusion to cut back in early December. This decision was based on his observation of a smooth running plant when it started full operations after the basic steel strike was concluded in early November 1959. He determined that in view of the modifications and repairs in the plant that a smaller staff would be sufficient. He corroborated Green by stating that he spoke to him about the problem in the middle of December but agreed with Green that the terminations should not start until after the holidays. Upon his return from Florida he, on January 5, viewed the running of an experimental pilot plant in the company of Jones & Laughlin officials and when the test was successfully completed told Green that there was no excuse for delaying the layoff. He testified that during that week Green assured him that everything was being taken care of with reference to cutting back. Buncher again left for Florida, returned on January 17 and was disappointed to learn from Green that he had laid off only five men. He corroborated Green about the decision to meet the next morning at the plant and the tour and discussion of the layoff on the 18th and 19th of January at Nine Mile Run.

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Moses Pasquarelli, superintendent of the Nine Mile Run operation, also gave evidence of a decision to cut employment made prior to January 15, 1960. He testified that he first learned of a contemplated layoff from Green on January 2, when Green told him Jack Buncher was unhappy and to start thinking about laying some men off. Green, after discussing the problem with him, told him to give the matter more thought and it would be considered again on the following Monday. On Monday, January 4, he and Green discussed the matter again and continued to talk about it all that week without a final decision on names or numbers. On January 11 Green appeared in Pasquarelli's office again and insisted that the matter under advisement had been considered long enough and that Pasquarelli should decide on some individuals immediately so that their names could be given to the timekeeper for severance on Friday. Pasquarelli agreed and gave Green five names: John Cindrick, Wytiaz, Ivy, Roth, and Ashford. Pasquarelli also testified that he gave the names of the five employees to Timekeeper Chase for layoff and then that day personally notified John Cindrick, Wytiaz, and Ashford that they were to be let go Friday and the next day told Ivy and Roth. Timekeeper Frank Chase testified that on January 11 Pasquarelli told him to arrange to have five men laid off as of the 15th and he called the North Side office and requested that termination papers be prepared for Cindrick, Roth, Wytiaz, Ivy, and Ashford.

I do not believe the Respondent's account of a preliminary decision to make a cutback in December 1959 culminating in a final decision to lay off five men on January 11

as of the 15th of the month. Pasquarelli's testimony that he personally, as a favor, told John Cindrick, Roth, Ashford, Ivy and Wytiaz on January 11 or 12 that they were to be laid off on January 15 is incredible when viewed in the light of the remarks he and Green made to some of those men subsequent to January 11. Roth was asked by Pasquarelli, on the 15th, what he knew about the Union and told not to be afraid of his job but let Pasquarelli know. Green interrogated John Cindrick, on January 15, about union activities and told him that the union activities would be an excuse for Buncher to shut down. Similarly, Ashford was questioned about the Union in the company office by Green, on January 15, and told that the Respondent had received a letter from the Union. To address these remarks to men whose employment had been suddenly severed and who could not be expected to be kindly disposed toward the Company would be risky industrial relations to say the least.[9] In addition, Cindrick denied that Pasquarelli gave him prior notice of the layoff and although Ivy, Roth, Ashford, and Wytiaz were not called in rebuttal, the whole tenor of their testimony on direct, which I credit, is to the effect that they had no knowledge, prior to joining the Union on the 13th, that they, or anyone else, were to be laid off. When they were laid off by Pasquarelli on the evening of the 15th their final checks came as a surprise and their conversations with Pasquarelli at that time about the reasons for the layoff so indicate. Other witnesses for the General Counsel also testified that there were no rumors of a layoff prior to their union applications. If the five

[9] *WTVJ, Inc.*, 120 NLRB 1180, 1186, enfd. 268 F. 2d 346 (C. A. 5).

men who were laid off on the 15th were told of their proposed layoff on the 11th, such information, in a plant of only 34 employees, would have been a matter of common knowledge instantly. In addition, Wytiaz and Cindrick had been told by McNabb earlier in the week that they were to "push the dump" Sunday, that is, work that day removing boulders and waste from roads, which is a further indication that there was no management decision to separate them on the 11th. In these circumstances, I discredit Pasquarelli's and Green's testimony that there was a firm decision to lay off any specific individual on January 11 and Chase's testimony that he was told to have the final pay prepared on that day.

On the other hand, I do not think it unlikely that Buncher, Green, and Pasquarelli may have had some general thoughts and conversations about a possible cutback prior to the advent of the Union. I find, however, that the final decision to eliminate employees did not come until January 15, when the Company became aware of the union activities of the employees, and that it was substantially motivated by a desire to eliminate known or suspected union adherents.

Neither Green, the Respondent's general manager, nor Pasquarelli, who is in complete charge of Nine Mile Run, ever indicated to Buncher that the operation was overstaffed. Green visits the operation every day and talks to Pasquarelli about job problems, yet Green and Pasquarelli did not discuss the matter among themselves until January 2, 1960, at the earliest. At that time Green did little more than tell Pasquarelli that Buncher was unhappy and to give the matter some thought. With all the

thought that Pasquarelli purported to give the matter he was admittedly unable to come up with the names of any employees to be specifically eliminated until January 11, according to his testimony. Buncher testified that what he had in mind in early December was a reduction of 15 jobs. Such a cut would have meant a saving in labor cost of about $1,500 a week, yet Buncher, without any reluctance, accepted Green's suggestion that the layoff be delayed until after the holidays, and it was in fact delayed until January 15. This generous treatment of employees does not square with the precipitate layoff, without notice, of all 13 men named in the complaint. Although Buncher was solely involved in the determination to make a drastic cutback he took no part in its planning or execution until January 18, at the earliest, but returned to Florida leaving Green with the problem. Although Green talked with Buncher by telephone, and Buncher did not return until the 17th of January, the record is barren of any evidence of discussions or statements by either about the problem and Green apparently made no progress reports to Buncher. The casual handling of the whole matter by the principal parties involved indicates that if a cutback were contemplated at all in December and early January,[10] it was not pressed seriously by anyone in management but became of immediate importance only when, on January 15, the Company learned that the Union had organized the men and sought recognition. On that date the Respondent accelerated any plans it may have had for a layoff and precipitately and abruptly discharged Cindrick, Roth, Wytiaz, Ivy, and Ashford in order to thwart the Union's organizational efforts.

[10] The addition of two employees, Ashford and Harlan Shearer, to the Nine Mile Run operation in December did not seem to concern Buncher or Green.

Decision and Order of the National Labor Relations Board and Trial Examiner's Intermediate Report, June 30, 1961, 131 NLRB 1444.

Buncher's testimony that he, with total unawareness of union activity at his Company, called Green on his return to Pittsburgh, was annoyed to find that only five men had been laid off and made arrangements with Green to meet him the next day at Nine Mile Run to survey the facility for the purpose of making additional reductions, solely on an economic basis, is discredited. General Manager Green told employee Greene, on January 15, that Buncher would be out on the job Monday (January 18) "with fire in his eyes." Green and Pasquarelli interrogated other employees about the Union on January 15 in a context of threats and it is clear, therefore, that on that date they knew that Buncher would not only be at the operation on the following Monday but that he would be there in an unhappy frame of mind because of the Union.

Jack Buncher did visit the job on January 18 and 19 but if he had any thoughts to reduce employment for economic reasons they were now colored by an intention to quickly ascertain the Union's strength and eliminate its adherents. This is the only proper inference that can be drawn from his intense and repeated questioning of employees on those dates as set forth in greater detail in subsection B, 1, above. In addition, his instructions to Green and Pasquarelli to make additional cuts in the staff and his participation in the decisions about jobs to be cut, in such a context of interference, restraint, and coercion, indicates that the decisions were motivated, at least in substantial part, by antiunion considerations, and I so find. Buncher told Green how many jobs he wanted eliminated, Green discussed the matter with Pasquarelli and Pasquarelli, for the most part

made the final decisions to lay off or transfer. All officials participated in the acts of interference described above and Pasquarelli's ultimate conclusions could not help but be determined by the views of his superiors. The decision to make a staff reduction at the time, therefore, despite the economic factors which have justified it, was not only triggered by the advent of the Union, but the selection of the employees to be laid off or transferred was also motivated by antiunion considerations in substantial part.

Other evidence in the record supports a finding that selection of employees for layoff and transfer was improperly motivated. After 5 or more days of intense interrogation it is reasonable to assume, considering the size of the staff involved, that Respondent knew the identity of every one of the 22 employees who had signed union cards, indeed the Respondent told employees it knew who had joined the Union. A total of 13 employees were caught in the layoff and all were among the 22 applicants for union membership. Eleven of the thirteen had been interrogated about the Union by company officials and one had had a threat made to him by McNabb, whom I have found not to be a supervisor under the Act, but who acted as the Respondent's messenger in calling employees to the office for interviews. The 13th employee, Ivy, appears in Buncher's inquiry of Rutherford about whether Ivy had gone to the meeting with him. Similarly, the Respondent, in its attempts to get information about the Union paid particular attention to the activity of certain employees. Vinsick, for example, was asked by Buncher if John Cindrick had approached him about the Union and told that Buncher considered John

Cindrick the ringleader. Epps was asked on January 18 if Collier had given him a union card and Collier was laid off that night. Harland Shearer was also asked, when interviewed by company officials, whether Loughner had signed a card. Loughner was laid off the very next day. James Cindrick, after his brother John had been laid off, was told that if John would tell the Company what he knew about the Union he would be reinstated, and the Shearer brothers, after being told by Buncher that they would be the first to be laid off in a reduction in force, since they were the newest employees, were told to go to the Union and get their cards back which they indicated they would. The Respondent's interest in the union activity of an employee, even after he was laid off (Cindrick), in the activity of others just prior to their layoff, purportedly for economic reasons, and in the activity of others still employed and never laid off while telling them that they would be the first to go if the Union came in, indicates clearly that the employee's union activity was a prime factor in determining whether he left, stayed or returned to employment during the cutback.

With respect to the selection of particular individuals for layoff or transfer, the Company offered evidence of the basis for its selections. It would appear from Buncher's, Green's, and Pasquarelli's testimony, that with one exception, namely, Collier, Buncher claims no involvement in the actual selection. Green, although purporting to have discussed the men with Pasquarelli for a substantial period of time, appears to state that he left the final selection to Pasquarelli. Pasquarelli gave his reasons and these rea-

sons, considered apart from the considerable evidence of antiunion motivation described herein, cannot be said to be completely untenable, although many of them appear to be petty and inflated. However, in evaluating the asserted bases for selection it must be considered that Jack Buncher testified that there was nothing seriously wrong with the work of any of the men, that he never had any serious complaints about their work and that they would be rehired if needed. He stated that one of the men, Ivy, would not have been let go if Buncher had been present. It is appreciated that in an economic cutback, selection of men equally competent requires fine decisions, particularly in the absence of a seniority agreement or practice, and the Company's business judgment is not to be lightly cast aside and errors in judgment substituted for proof of discrimination. The Company's asserted reasons for its selections, however, cannot be considered apart from the considerable evidence indicating discrimination in selection set forth above.

Considered in that light they do not overcome the General Counsel's case.

I find and conclude that, although the Respondent had economic justification for a reduction in staff to the number now presently employed, it was substantially motivated in reducing its staff when it did in order to destroy the Union's majority status and that a substantial factor in its selection of the employees listed in Appendix A for transfer or layoff, or both, was the employees' known or suspected union activity. In so timing an otherwise proper

reduction in staff and discriminatorily selecting employees for transfer or layoff the Respondent violated Section 8(a)(3) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and, such of them as have been found to constitute unfair labor practices, tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

It having been found that the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discriminatorily laid off or discriminatorily transferred and laid off the employees listed in Appendix A, attached hereto, it will be recommended that Respondent offer them full and immediate reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and, in the event that there

is insufficient work for all such employees entitled thereto, to dismiss, if necessary, all persons newly hired after the Respondent's discrimination. If there is not then sufficient work available for the remaining employees and those to be offered reinstatement, all available positions shall be distributed among them without discrimination against any employee because of concerted activities, in accordance with the system of seniority or other nondiscriminatory practice heretofore applied by the Respondent in the conduct of his business. The Respondent shall place those employees, if any, for whom no employment is available after such distribution, on a preferential list, with priority in accordance with such system of seniority or other nondiscriminatory practice heretofore applied by the Respondent in the conduct of his business, and thereafter offer them reinstatement as such employment becomes available and before other persons are hired for such work.

It shall also be recommended that Respondent make whole those employees listed in Appendix A against whom it discriminated for any losses they may have suffered because of the Respondent's discrimination, by payment to each of them of a sum of money equal to the amount he normally would have earned as wages from the date of such discrimination to the date of the offer of reinstatement, or placement on a preferential list, as the case may be, less his net earnings during said period, the backpay to be computed in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289. I shall also recommend that Respondent preserve and make available

to the Board, upon request, payroll and other records necessary to determine employment rights and the amount of backpay due.

It will also be recommended, in view of the nature of the unfair labor practices the Respondent has engaged in, that it cease and desist from infringing in any manner upon the rights guaranteed employees by Section 7 of the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Steelworkers of America, AFL-CIO, and House Wreckers and Scrap Yard Laborers' Local Union 178, affiliated with, International Hod Carriers', Building and Common Laborers' Union of America, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. By discriminating in regard to the hire and tenure of employment of the employees listed in Appendix A, thereby discouraging membership in the Union, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. By engaging in the conduct set forth under Section III, B, 1 and 2, above, Respondent interfered with, restrained, and coerced its employees and has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

APPENDIX J

Statutes

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151 *et seq.*:

"Sec. 10. (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and *to take such affirmative action* including reinstatement of employees with or without back pay, *as will effectuate the policies of this Act: Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent

to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such members, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed."

"Sec. 10. (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written

petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

MB COURT, U. S.

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IN THE

Supreme Court of the United States

No. [redacted] 222

October Term, 1969

JACK G. BUNCHER, d/b/a
THE BUNCHER COMPANY,

Petitioner,

v.

THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE*

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE*

I. Interest of the National Chamber in this Matter

The Chamber of Commerce of the United States is a federation of over 3,700 national, local and state chambers of commerce and trade and professional associations. The National Chamber has a direct membership of more than 33,000 business firms and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

A majority of these firms are employers subject to the jurisdiction of the National Labor Relations Board.

The Chamber, as a representative of the business community, is concerned with the exercise of the National Labor Relations Board's authority in resolution of back pay disputes. Its concern is not with the details of the instant case, or how much money if any Mr. Buncher may have to pay, but with the principles involved as stated by the majority of the Court in the decision of *N. L. R. B. v. Seven-Up Bottling Co.*, 344 U. S. 344, 346.

These principles are sound and reasonable, and we are concerned lest they be abandoned in the interest of expedition or because the Board or the Court may believe one employer should be punished.

II. Statement of the Issue

The National Chamber's brief will principally address itself to the issue of whether the Board, in a back pay proceeding, is permitted to ignore the specific directions of the Board and the Court of Appeals in the initial unfair labor practice case, and to fashion a back pay remedy based entirely upon a system of pseudo "seniority" having no relation to the facts, circumstances and requirements of the case.

III. ARGUMENT.

a. The Board's remedial power does not include the power to order back pay on an arbitrary and unreasonable basis having no relation to the particular facts and circumstances out of which the case arose.

Section 10(c) of the National Labor Relations Act empowers the National Labor Relations Board to order a party who has engaged in the commission of an unfair labor practice "to take such affirmative action . . . as will effectuate the policies of this Act."[1]

While the power thus granted the Board is a "broad discretionary one" it is not unlimited,[2] and the Board must confine its remedies to orders "which can be fairly said to effectuate the policies of the Act"[3] and are "functions of the purposes to be accomplished".[4] Board orders must be "persuasively . . . related to the proven unlawful conduct"[5] and may not be "oppressive" in the particular situation calling for redress.[6] The power of the Board "to command affirmative action is remedial, not

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[1] In pertinent part Section 10(c) reads as follows:

"If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him."

[2] *N. L. R. B. v. Seven-Up Bottling Co.*, 344 U. S. 344, 346; *N. L. R. B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 257.

[3] *Virginia Electric and Power Co. v. N. L. R. B.*, 319 U. S. 533, 540; *Fibreboard Corporation v. N. L. R. B.*, 379 U. S. 203, 215-217.

[4] *N. L. R. B. v. Seven-Up Bottling Co., supra.*

[5] *N. L. R. B. v. Express Publishing Co.*, 312 U. S. 426.

[6] *N. L. R. B. v. Seven-Up Bottling Co.*, 344 U. S. at 349.

punitive"[7] and is "merely incidental" to the primary purpose of Congress to stop and prevent unfair labor practices. *United Automobile Workers v. Russell,* 356 U. S. 634. It is also well settled that Congress did not establish a general statutory scheme authorizing the Board to award compensatory damages for injuries caused by wrongful conduct. In *Virginia Electric Co. v. N. L. R. B.,* 319 U. S. 533, 543, the Supreme Court said:

> "The instant reimbursement order [which directs reimbursement by an employer of dues checked off for a dominated union] is not a redress for a private wrong. Like a back pay order, it does restore to the employees in some measure what was taken from them because of the Company's unfair labor practices. In this, both these types of monetary awards somewhat resemble compensation for private injury, but it must be constantly remembered that both are remedies created by statute—the one explicitly and the other implicitly in the concept of effectuation of the policies of the Act—which are designed to aid in achieving the elimination of industrial conflict. They vindicate public, not private, rights." *Cf. Agwilines, Inc. v. Labor Board,* 87 F. 2d 146, 150-51, 1 LRRM 277; *Phelps Dodge Corp. v. Labor Board,* 313 U. S. 177, 8 LRRM 439.

Nor may a Board order be justified on the basis of deterring future violations of the Act, because "if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up a system of penalties which it would deem adequate to that end." *Republic Steel Corp. v. N. L. R. B.,* 311 U. S. 7, 12.

We urge the Court to closely examine the basis of the Board's back pay award in the instant case. Our review of the record persuades us that the Board has clearly exceeded the bounds of reasonable discretion.

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[7] *Consolidated Edison Co. v. N. L. R. B.,* 305 U. S. 197, 236; *Local 60 United Brotherhood of Carpenters, et.,* 365 U. S. 651.

Apparently, in the interests of expediency, or in an attempt to punish Buncher, the Board has chosen to ignore its own prior findings and the prior findings of the Court in the unfair labor practice case, that Buncher, for legitimate economic reasons, had reduced the size of his work force subsequent to the discriminatory activity;[8] and, in addition, that Buncher did not utilize a seniority system in selecting employees for layoff.[9]

Nevertheless, in the face of voluminous uncontradicted testimony in respect to the criteria actually applied by Buncher, the Board developed a system of pseudo seniority which it arbitrarily applied to determine the amount of back pay to which the employees are entitled. Even the Board does not contend that this "seniority system" has any real relation to the method which Buncher would have employed—or actually did employ—in making layoffs.

Thus, in deciding the case, the Board backed away entirely from the issue on which testimony was taken at the back pay hearing. The Board and the Court in the unfair labor practice case had directed that back pay issues were to be tested by "such system of seniority or other non-discriminatory practice heretofore applied by the Respondent in the conduct of his business".[10]

The Board ignored the facts of Buncher's business, even though, as the majority of the Court in its original decison clearly recognized, these facts were readily available.[11]

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[8] *The Buncher Company*, 131 NLRB 1444, 1445, 1456-1457; *N. L. R. B. v. The Buncher Company*, 316 F. 2d 928, 929.

[9] *N. L. R. B. v. The Buncher Company, supra*, 316 F. 2d at 929.

[10] *The Buncher Company, supra*, 131 NLRB 1445.

[11] Circuit Court's original opinion denying enforcement to the Board's Order, p. 8 (Buncher Petition, App. D pp. 30b-31b).

A hearing and the taking of testimony was apparently regarded by the Board as unnecessary to its decision making process.

We feel very strongly that if this decision of the Board is enforced in its present posture the Board will have been given carte blanche to develop remedies based upon "unsubstantiated assumptions",[12] without regard to the facts, which may be used to punish employers in the manner the Board thinks best.

The effect of this decision upon all parties who find themselves in the position of respondent in a Board proceeding will be substantial and adverse. Certainly it will not serve the overall purposes of the National Labor Relations Act.

IV. Conclusion

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[12] *Id.*, p. 7, n. 11 (Buncher Petition, App. D pp. 29b-30b).

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No. 222

In the Supreme Court of the United States

OCTOBER TERM, 1969

JACK G. BUNCHER, D/B/A THE BUNCHER COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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356—774—69

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OPINIONS BELOW

The Board's supplemental decision and order (Pet. App. 36b–96b) are reported at 164 NLRB No. 31. The *en banc* decision of the court of appeals enforcing the Board's supplemental order (Pet. App. 3b–19b) is reported at 405 F. 2d 787. The Board's initial decision and order (Pet. App. 97b–147b) are reported at 131 NLRB 1444, and the opinion of the court of appeals enforcing that order is reported at 316 F. 2d 928.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1969 (Pet. App. 1b–2b). The petition

for a writ of certiorari was filed on June 10, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in computing the amount of backpay due employees who had been discriminatorily discharged, it was reasonable in this case for the National Labor Relations Board to use seniority as a basis for determining which of the employees would have been selected for layoff in a series of economic reductions that occurred during the backpay period.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), are set forth at pp. 148b–150b of the Appendix to the petition.

STATEMENT

A. THE UNFAIR LABOR PRACTICES

On June 30, 1961, the Board decided (131 NLRB 1444) that petitioner's Company had committed a series of unfair labor practices designed to defeat the organizational efforts of the United Steelworkers of America, AFL–CIO. The Board found, *inter alia*, that the Company's layoff of thirteen union adherents at its Nine Mile Run facility violated Section 8(a)(3) and (1) of the Act, in that the Company "was substantially motivated in reducing its staff when it did in order to destroy the Union's majority status and that a substantial factor in its selection of the employees * * * for transfer or layoff, or both, was

the employees' known or suspected union activity." *Id.* at 1461. The Board ordered the Company to offer reinstatement to the thirteen discriminatees and to make them whole for any losses of pay suffered because of the Company's discrimination. Recognizing "that some of the employees discriminated against on January 15 through March 4, 1960, might have been laid off in a subsequent reduction in force even absent the [Company's] unfair labor practices," the Board further provided that "such possible termination of employment shall also be taken into consideration in computing the backpay due these employees under the terms of this Order." *Id.* at 1445. On June 14, 1963, the court of appeals entered a decree enforcing the Board's order in full. *National Labor Relations Board* v. *Jack G. Buncher, d/b/a The Buncher Company*, 316 F. 2d 928 (C.A. 3).

B. THE BACKPAY PROCEEDINGS

On August 31, 1964, pursuant to the procedure specified in the Board's Rules and Regulations, 29 C.F.R. 102.52, *et seq.*, the Board's Regional Director issued a Backpay Specification and Notice of Hearing (J.A. 750a–752a; 4a–73a).[1] The specification set forth the dollar amounts allegedly due each discriminatee and indicated that the following method of computation had been used: (1) up to May 12, 1960, each of the discriminatees was awarded backpay "in accordance with the weekly average hours worked by the employees of [the Company] at the Nine Mile Run facility"; (2) after that date, when a reduction in

[1] "J.A." refers to the Joint Appendix to the briefs below.

force due to a loss of orders occurred, each discriminatee's entitlement to backpay was determined by "allocating the available jobs at the Nine Mile Run facility among the discriminatees" and "all of the other employees who were employed at [that] facility at the time of the discrimination" in accordance with "their seniority,"[2] and, "when sufficient work was not available at the Nine Mile Run facility for a discriminatee," by allocating the available jobs at the Company's other locations on the same basis (J.A. 5a–5b).

The Company filed an answer to the specification, in which it averred that all the discriminatees would have been selected for layoff on May 12, 1960 (J.A. 753a; 117a, 137a–138a). The Trial Examiner then ordered the Company to specify the criteria it had utilized in determining whom to retain or lay off (J.A. 753; 118a, 138a). The Company filed a response listing ten criteria (J.A. 119a),[3] with an attached chart which purported to apply those criteria to the discriminatees, retained employees, and employees first hired during the backpay period (J.A. 120a–133a).

On August 6, 1965, following a hearing, the Trial Examiner recommended dismissal of so much of the

[2] "Seniority" was based on the employee's most recent hiring date with the Company (Pet. App. 6a).

[3] The ten criteria were: ability to perform available work, rate of pay, productivity, application to work, attitude toward work and willingness to learn, ability to learn new skills, limitation on availability, experience with the Company, experience with other employers, and relative length of service with the Company (J.A. 726a; 119a).

specification as awarded backpay for the period after May 12, 1960, on the ground that the Board, in the earlier unfair labor practice proceeding, had found that the Company did not use seniority "either solely or primarily in the course of its business operations" (J.A. 756).[4] The Board reversed and remanded the matter for further hearing (J.A. 717a–718a), holding that "'an absence of the use of seniority by the Respondent does not render the General Counsel's utilization of seniority in this proceeding arbitrary or unreasonable, *per se*'" (J.A. 718a).

On remand, the Trial Examiner considered the Company's claim that none of the discriminatees would have been rehired after May 12, 1960. He found that the Company's evaluations of employees were not based on any written records, and that its supporting testimony was "fraught with inconsistencies, internal contradictions, exaggerations and implausibilities" (J.A. 730a, 733a). He also found that the Company did not reemploy any of the discriminatees for some two years following their layoff, but hired new employees or rehired other former employees to perform work which the discriminatees admittedly could have performed.[5] Accordingly, the Examiner concluded that "the charted information was contrived for the purposes of denying backpay to the claim-

[4] In the prior proceeding, the Board had stated: "[S]election of men equally competent requires fine decisions, particularly in the absence of a seniority agreement or practice * * *." 131 NLRB 1444, 1460.

[5] J.A. 742a; 420a–422a, 424a, 526a–528a, 534a–535a, 540a–542a, 557a–560a, 579a–581a, 585a–586a, 595a–597a, 615a, 701a–702a, 790a, 791a.

ants" on or after May 12, 1960 (J.A. 733a). He recommended that the Board adopt the Regional Director's backpay specification (J.A. 744a–745a).

The Board affirmed the Examiner's decision. Finding that the Company's "system" had been discredited, the Board concluded that it was thus necessary to devise a "just and reasonable" means of estimating the pay which the employees would have earned but for the Company's unfair labor practices (Pet. App. 41b). The Board further found that, in view of the "extensive use of seniority by other employers in determining layoff and recall, the objective nature of the seniority system, and the complete absence of an alternative offered by the [Company] other than personal judgment," the Regional Director's "utilization of seniority in framing the backpay specification [was] not unreasonable" (Pet. App. 42b–43b). Accordingly, the Board adopted the order of the Examiner, which required the Company to pay the thirteen discriminatees sums ranging from $1,361.30 to $14,438.49 (Pet. App. 45b, 72b).

A panel of the court of appeals (with one judge dissenting) declined to enforce the Board's order (Pet. App. 22b–35b). On the Board's petition for rehearing, the court *en banc* (with three judges dissenting) reversed the panel and sustained the Board's order (Pet. App. 3b–19b).

ARGUMENT

Petitioner does not appear to contest the settled principle, applied by the court of appeals, that, where "an employer has discharged employees discrimina-

torily, but it asserts in mitigation of backpay claims that such employees would have been laid off even absent such discrimination, it has the burden of proving that fact" (Pet. App. 7b).[6] Rather, the questions presented are whether the Board properly concluded that the Company did not sustain its burden of showing which of the discriminatees would in any event have been laid off on and after May 12, 1960, and whether, in these circumstances, it was reasonable for the Regional Director to use seniority as a basis for determining that issue. These questions necessarily turn on the facts of this particular case, and there is no conflict of decisions; thus, there is no occasion for further review. Moreover, as we now show, the court below correctly sustained the Board's decision in this case.

1. In support of its affirmative defense that none of the discriminatees would have been retained after May 12, 1960, the Company produced, at the backpay hearing, a chart purportedly applying to all of the Company's employees the ten criteria (see n. 3, *supra*) allegedly followed in selecting individuals for retention, layoff, or recall. However, this chart, covering the work performance of 225 employees over 4½ years, was constructed in November 1964, solely on the basis of personal recollections of the Company's supervisors (Pet. App. 40b, n. 8, 57b–58b; J.A. 308a, 317a, 467a, 482a–483a, 490a–492a, 636a, 662a). Furthermore, these supervisors not only had participated in the initial unfair labor practices against the dis-

[6] See, *e.g.*, *National Labor Relations Board* v. *Mastro Plastics Corp.*, 354 F. 2d 170, 175–176 (C.A. 2), certiorari denied, 384 U.S. 972.

criminatees, but, as the Board found, their testimony contained numerous inconsistencies and exaggerations, in an effort to support the Company's contention that *all* the discriminatees were less desirable than any of the nondiscriminatees (Pet. App. 43b–44b, 60b–67b). In these circumstances, the court below properly concluded that the Board was justified in finding "that the Company's evidence contained so many pervasive infirmities that it was not a reliable basis for deciding the backpay issue." (Pet. App. 7b).

2. With the Company having failed to sustain its burden of proving which discriminatees would in any event have been laid off after May 12, 1960, the Board was faced with the alternative of either assuming that none would have been (cf. *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 872 (C.A. 2)), or devising a reasonable layoff formula. Petitioner can hardly complain that the Board adopted the latter alternative which carried a potential for reducing its liability.[7] Nor was the Board arbitrary or unreasonable in using seniority as the basis for estimating which employees could have been laid off. As the court below pointed out, although the "Company did not have a formal seniority system," the "record in this case does indicate that length of service was a factor in its employment 'policy,'" and "the seniority standard represents 'normal industrial practice generally.'" (Pet. App. 8b).

[7] As the seniority formula actually worked out in this case, only one of the discriminatees was found to be ineligible for employment by the Company on and after May 12, 1960; his backpay was cut off as of that date (Pet. App. 46b, n. 2, 52b–53b).

There is no support for petitioner's contention that the use of seniority alone leads to anomalous results in this case. The Company conceded that each of the discriminatees was competent (J.A. 701a–702a), and the record further shows that each was qualified in one of the Company's three major work classifications—welder, heavy-equipment operator, or laborer (J.A. 123a, 201a–220a, 226a–244a, 244a–248a). In these circumstances, it was reasonable for the Board to assume (see J.A. 177a) that appropriate work was available for a discriminatee at any one of the Company's three locations where these skills were in fact utilized. Petitioner now challenges this assumption in one instance, contending that, since only one power shovel was operating, "[m]aybe one of the discriminatees would have worked, but not three" (Pet. 10). It was rational, however, to conclude that John Cindrick, one of the discriminatees, would have been retained on that shovel, since he was concededly "superior" (J.A. 123a, line 28) in that operation and had performed it for several years. The other two discriminatees who were also heavy-equipment operators, James Cindrick and William Greene, while not required on the shovel, were concededly "superior" in operating hi-lifts, dozers, and drag lines (J.A. 123a, lines 27, 29). Since these jobs remained and were filled by employees who were both junior, and either less versatile on heavy equipment (Shearer, J.A. 314a, 123a, line 46) or admittedly careless (Hinger, J.A. 123a, line 47, 509a, 622a–623a), the Board was warranted in allocating these jobs to James Cindrick and Greene.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

No. 222

October Term, 1969

JACK G. BUNCHER, d/b/a
THE BUNCHER COMPANY,

Petitioner,

v.

THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR JACK G. BUNCHER, d/b/a THE BUNCHER COMPANY

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This Reply Brief is filed in accordance with the provisions of Rule 24(4) of the revised Rules of the Supreme Court of the United States to respond to two assertions advanced by the National Labor Relations Board in its Brief In Opposition. Although these are important matters for the consideration of the Court we will deal with them as briefly as possible.

1. The Board attempts to cloud one of the principal issues in this case by arguing that Buncher does not con-

test that it must bear the burden of proving that certain employees are not entitled to backpay in this case because they would have been laid off, in the normal course of events, even in the absence of discrimination. The Board's argument entirely misses the point and serves only to obscure an important issue in the case.

The point is that the ground rules for the backpay proceeding, established by the prior decisions of the Board and the Court of Appeals, were completely ignored by the Board in developing the backpay specification upon which the Board and Court Orders in the instant case are based.

In the original unfair labor practice case both the Trial Examiner and the Board found that there existed, at the time of the discriminatory discharges, economic justification for a reduction in force under normal business practices and that some of the discriminatees might have been laid off in a subsequent reduction in force.[1]

The Court of Appeals took special note of this part of the Board's Order in its decision on the Board's Petition for Enforcement of the Order.[2]

On this basis the ground rules for the backpay proceeding were established. The purpose of the hearing was to discover which of the discriminatees would have been selected for layoff absent unfair labor practices in the admittedly economic reduction in force.[3] The test, in this proceeding, was to be "such system of seniority or other non-discriminatory practice *heretofore applied by the Respondent* in the conduct of his business" (emphasis supplied).[4]

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[1] *The Buncher Company*, 131 NLRB 1444, 1445, 1456-1457 (1961).

[2] *N. L. R. B. v. The Buncher Company*, 316 F. 2d 928, 929 (3rd Cir. 1963)

[3] *The Buncher Company, supra*, 131 NLRB 1444, 1445.

[4] *Id.*, at 1445.

As Trial Examiner Rosenberg noted in his Supplemental Decision (App. G, p. 85b, n. 14), General Counsel conceded that Buncher had no seniority system. The Trial Examiner also found (App. G, p. 85b, n. 17) that General Counsel made only one attempt to show use of seniority. To quote the Trial Examiner, "This attempt proved abortive"—it actually disproved use of seniority by Buncher. He also found that the Board and the Court had adopted Trial Examiner Bott's prior finding to this effect and that this was the law of the case (App. G., p. 85b).

In spite of these undisputed facts, the Regional Director used what he called "seniority" as the sole basis in determining who would have been laid off or retained. The backpay specification paid no attention to the non-discriminatory criteria ordinarily applied by Buncher in the conduct of his business.

This is directly contrary to the ground rules set up by the Board, pursuant to which the backpay proceeding was held, that the determination should be made using non-discriminatory criteria "heretofore applied by the Respondent".

Thus, the Board's argument concerning the burden of proof only tends to obscure the fundamental infirmity of the backpay specification upon which the Board and Court Orders in this case are based.

2. The Board argues that Buncher "conceded that each of the discriminatees was competent" and that the record demonstrates that each was qualified in one of the Company's three major work classifications. From this the Board argues that it was "reasonable . . . to assume" that appropriate work was available for a discriminatee at any one of the Company's three locations where employees

performed work in these classifications (Brief In Opposition, p. 9).

The Board unfairly characterizes Buncher's testimony regarding the ability of the discriminatees saying that he conceded that each of them was competent (Brief In Opposition, p. 9). What he said was:

> "Q. If you were going to hire anybody back it would have been [799] logical to hire them back?
>
> "A. If I were going to hire somebody back *and I knew I had a job of just shovel operator and running a shovel day in and day out*, something like that, I would like to—I would say certainly I would." (Joint App. 702a) (emphasis supplied).

This certainly did not mean that if he had a job as barge man, steel erection man, or any of the variety of jobs other than running a shovel that he would call the shovel operator in to do these jobs. The slag operation, where all the discriminatees were employed, due partly to increased efficiency and partly to reduced work, went from a total of 34 men on January 14, 1960 (Joint App. 846a); down to 23 men on March 10, 1960 (Joint App. 847a); to 15 men on June 30, 1960 (Joint App. 851a); to 17 men on May 18, 1961 (Joint App. 853a).

The fact that a man was a competent shovel operator and that Buncher had nothing against him or his work as a shovel operator certainly does not mean that Buncher would have or should have retained him when there was no shovel to operate, applying non-discriminatory tests.

The Board has not attacked Buncher's decision as to the number and identity of jobs to be filled, at least subsequent to May 12, 1960. The jobs that were filled are thus known. The job descriptions for each were not controverted. The record is thus in a posture to permit analysis

of each individual employee laid off or retained on the basis of the jobs actually filled.

Reference to this record, which painstakingly reviews the employment history, experience and capability of every man and every job at every location, applying the non-discriminatory factors normally applied by employers, and by Buncher, will demonstrate that we produced testimony and evidence to support our conclusion that the discriminatees would have been laid off.

Buncher was entitled to have the Trial Examiner and the Board make a decision, applying these tests, as to each discriminatee. Instead, the Board advanced only general arguments as to why an employer can never use such tests, and general statements that none of Respondent's testimony, evidence or witnesses (except the parts the Board uses) are credible.

Of course, Counsel for the Board now attempts a fragmentary analysis in his brief, but it is the Board and not Counsel that has this responsibility. As Mr. Justice Goldberg said in *N. L. R. B. v. Metropolitan Life Insurance Co.*, 380 U. S. 438 (1965):

> "* * * Although Board counsel in his brief and argument before this Court, has rationalized the different unit determination in the variant factual situations of these cases on criteria other than a controlling effect being given to the extent of organization, the integrity of the administration process requires that '*courts may not accept appellate counsel's post hoc rationalizations for agency action* . . . . . *.*' " (emphasis supplied).

For these reasons, as well as those stated in our Petition, we assert that what the Board applied was not a "system of seniority," but an arbitrary, illogical and unreasonable mathematical formula.

Buncher was entitled to an unbiased, thorough analysis of all the non-discriminatory factors ordinarily used for each and every man on the basis of the whole record. Unless and until he gets that, he has not received the fair and impartial treatment guaranteed everyone under the law.

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